Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-5–02 OF 2017(P), 02(f)-6–02 OF 2017(P), 02(f)-12–02 OF 2017(P), 02(f)-13–02 OF 2017(P) AND 02(f)-14–02 OF 2017(P)

TENGKU MAIMUN CHIEF JUSTICE, AZAHAR MOHAMED CJ (MALAYA), ZALEHA YUSOF, ZABARIAH MOHD AND MARY LIM FCJJ

17 DECEMBER 2020

Companies and Corporations — Winding up — Just and equitable rule — Whether winding up of solvent company for breaching certain laws could not be 'just and equitable' in all cases — Whether court had duty to examine allegation of breach to determine whether alleged illegality was so fundamental and grave that dissolution of the company was warranted as the only way to end the illegality — Whether actions of directors breaching certain laws should not be ascribed to the company in order to wind them up — Whether courts should be slow to wind up companies unless they were clearly formed to carry out an illicit purpose or circumvent any law — Whether winding up of company should be remedy of last resort so that chaos was not brought to business and commerce and interests of innocent shareholders, creditors and the like were not irreparably damaged — Companies Act 1965 s 218(1)(i)

The appellant in the first three appeals herein, Tan Keen Keong @ Tan Kean Keong ('TKK') had petitioned the High Court to wound up three companies belonging to a group of family companies on the ground that it was 'just and equitable' to do so under s 218(1)(i) of the Companies Act 1965 ('the CA'). The court allowed two of the companies to be wound up — namely Tan Eng Hong Paper & Stationery Sdn Bhd ('TEH Paper') and Tan Eng Hong Holdings Sdn Bhd ('TEH Holdings') but dismissed the petition against Peace Centre Sdn Bhd ('PCSB'). The court ordered the winding up of TEH Paper and TEH Holdings despite finding that: (a) the grounds relied upon by TKK in his petitions were not made out; (b) the evidence TKK and his prime witness adduced in support of the petitions was not credible; (c) the petitions were an abuse of process because they were made to achieve collateral purposes, such as obtaining a shares buy-out; and (d) there was inordinate and fatal delay in the filing of the petitions and TKK had himself condoned of the matters he complained of. The court's decision to wound up TEH Paper and TEH Holdings was on its own finding that the two companies, directly or through their subsidiaries, had committed 'illegalities', namely, the breaches of various laws, ie, ss 136, 169, 171 and 364(2) of the CA; ss 193, 199 and 200 of the

Penal Code and s 114 of the Income Tax Act 1967 ('the ITA') (collectively referred to as 'the said statutory provisions'). The CA provisions concerned the duty of directors to produce accurate financial reports, give a true and fair view of the state of affairs of companies, not make false statements in company accounts and not use company funds to pay their income taxes; the Penal Code provisions concerned statutory declarations by directors to confirm the correctness of company accounts while the ITA provision related to directors who had evaded payment of taxes and/or had assisted in tax evasion. The Court of Appeal's affirmation of the High Court's decision led to the instant appeals by TEH Paper and TEH Holdings in which the questions of law posed were: (i) whether it was just and equitable to wound up a company under s 218(1)(i) of the CA merely on the ground the said statutory provisions had been breached, which, even if that was the case, could be regularised by provisions in the statutes themselves providing for penalties or fines; and (ii) whether a petitioner should be allowed equitable relief under s 218(1)(i) of the CA when his truthfulness and credibility had been impugned by the winding up court. TKK, on the other hand, raised two questions of law in his appeal, namely: (A) whether when there were applications to wound up more than one company in a group of family companies, the conduct of each company should be tested separately or together as a group; and (B) whether the principles governing an application under s 181 of the CA were applicable to a winding up application under s 218(1)(i). In his three petitions, TKK, who was a shareholder like the other individual respondents in these appeals, relied upon the same set of facts to allege that the directors of the three companies in question had acted in their own interests rather than in the interests of the members as a whole and had thereby conducted the affairs of the said companies in an unfair, unjust and inequitable manner.

Held, unanimously answering the leave questions posed by TEH Paper and TEH Holdings in the negative, allowing their appeals and setting aside the winding up orders, declining to answer the leave questions posed by TKK and dismissing his appeals:

(1) Since the High Court found no basis for the complaints in TKK's winding up petitions and that the petitioner lacked credibility and that the petitions were an abuse of process to achieve collateral ends, the court ought to have dismissed the petitions. It was not a situation where illegality or contravention of law formed the basis of the petitions under s 218(1)(i) of the CA (see paras 118–120).

(2) Before striking down agreements, voiding arrangements or winding up corporations, the court must be satisfied that the illegality or contravention of law was related, or bore sufficient nexus, to the activities or business of the company and/or for which the company was incorporated. Not all breaches of statutory requirements would result in a company being wound up even if the breaches attracted criminal

sanctions, otherwise there would be chaos in commerce and business. The court had to carefully examine the relevant statute complained of and determine its purpose or object before concluding one way or the other that the contract, act or deed in question was invalidated by the contravention (see paras 53–54).

(3) Although the court would act where there was illegality, it must be where the illegality was *ex facie* and where facts in relation to the illegality or contravention of law were uncontroverted. In the matter of liquidation of a corporate sole, winding up orders should only be granted where the cessation of the illegality complained of could only be achieved through or by the dissolution of the company itself and there was no other avenue or recourse available but to wound up the company in order to stop the illegality (see paras 49 & 85).

(4) In the instant appeals, none of the companies were formed with an illicit purpose or intent of circumventing any law, be it the Companies Act, the Income Tax Act 1967 or the Penal Code. The object and activities of TEH Paper and TEH Holdings and even PCSB were not in question or under scrutiny. The courts below failed to consider this important point. Where companies were fraudulently established and were themselves engines of fraud, their continued existence had to be immediately apprehended. And, it was in that sense that the court would not hesitate to wound them up to put an end to the unlawfulness (see para 86).

(5) In the instant appeals, the High Court had identified violations by the companies of specific provisions of the CA, the Income Tax Act and the Penal Code but failed to examine the intent of each of those statutes against s 218(1) and 218(1)(i). The provisions of the Penal Code and Income Tax Act were actually related to the contraventions of the CA. Section 169 read with s 171(1) of the CA concerned the duty of directors to produce financial reports which were accurate and gave a true and fair view of the state of affairs of the company; s 364(2) dealt with the situation where directors made false statements with regard to company accounts while s 136 concerned directors' usage of company funds to pay their income tax. In relation to those contraventions, the court should have taken into account s 218(1) and the other provisions of the CA as well as the intent of the CA itself. In the context of winding up, s 218(1)(b), (c) and (d) expressly provided the specific type or nature of contravention of the CA that merited a winding up. Those grounds should not be expanded. Had it been intended that any or all contraventions of the CA would warrant a winding up, there would have been some express provision to that effect. Instead, only selected contraventions were identified and there were good reasons for such provisions. These were prescribed situations where it would be just and equitable to wound up a company. The court should always be slow to

import into the 'just and equitable' ground, the right to wind up a company for contraventions of other provisions of the CA unless such breaches could be co-related with any of the other grounds in s 218(1) (see paras 87–90).

(6) In the instant appeals, even factually, there were grave concerns about the existence of the 'illegalities'. The contraventions and/or illegalities pertained to the 'family fund and under-counter activities' and how monies from the family companies were 'siphoned off' for various purposes including for payment of tax by directors. However, when the allegations were examined, it was readily apparent that there was much uncertainty, vagueness and paucity of evidence vital to establish the very existence of the alleged contraventions, wrongs or illegalities (see para 93).

(7) Violations of the CA by directors, unless they fell within some ground in s 218(1), should not be ascribed to the companies themselves in order to form the basis for winding them up. The 'just and equitable' jurisdiction had to be exercised carefully and judiciously, with special regard to the irreversible and drastic nature of winding up and the irreparable damage such action would cause to the interests of innocent shareholders, creditors and the like. Winding up was not the proper remedy in the instant case when there were more moderate remedies available, some of which were already meted out, such as those taken by the Inland Revenue Department. As for the petitioner, TKK, his remedy as a minority shareholder lay in an application under s 181 of the CA as the High Court found that his real complaint was of oppression and that he actually wanted his shares bought out (see paras 91–92 & 113).

[Bahasa Malaysia summary

Perayu dalam tiga rayuan pertama di sini, Tan Keen Keong @ Tan Kean Keong ('TKK') telah mengemukakan petisyen kepada Mahkamah Tinggi untuk menggulung tiga syarikat yang termasuk dalam kumpulan syarikat keluarga dengan alasan bahawa ia adalah 'adil dan saksama' untuk berbuat demikian di bawah s 218(1)(i) Akta Syarikat 1965 ('AS'). Mahkamah membenarkan dua syarikat tersebut digulungkan — iaitu Tan Eng Hong Paper & Stationery Sdn Bhd ('TEH Paper') dan Tan Eng Hong Holdings Sdn Bhd ('TEH Holdings') tetapi menolak petisyen terhadap Peace Center Sdn Bhd ('PCSB'). Mahkamah memerintahkan penggulungan TEH Paper dan TEH Holdings walaupun mendapati bahawa: (a) alasan yang disandarkan oleh TKK dalam petisyennya tidak dibuktikan; (b) keterangan yang dikemukakan oleh TKK dan saksi utamanya untuk menyokong petisyen tersebut tidak boleh dipercayai; (c) petisyen tersebut merupakan penyalahgunaan proses kerana ianya dibuat untuk mencapai tujuan jaminan, seperti mendapatkan pembelian saham; dan (d) terdapat kelewatan yang keterlaluan dan tidak boleh diterima dalam pemfailan petisyen dan TKK sendiri telah mengakui perkara yang

diadukannya. Keputusan mahkamah untuk menggulung TEH Paper dan TEH Holdings berdasarkan dapatannya sendiri bahawa kedua-dua syarikat tersebut, secara langsung atau melalui anak syarikatnya, telah melakukan 'perkara menyalahi undang-undang', iaitu, pelanggaran pelbagai undang-undang, seperti, ss 136, 169, 171 dan 364(2) AS; ss 193, 199 dan 200 Kanun Keseksaan dan s 114 Akta Cukai Pendapatan 1967 ('ACP') (dirujuk secara kolektif sebagai 'peruntukan undang-undang tersebut'). Peruntukan AS adalah berkaitan tanggungjawab kewajiban pengarah untuk mengemukakan laporan kewangan yang tepat, memberikan pandangan yang benar dan adil mengenai urusan syarikat, tidak membuat penyataan palsu dalam akaun syarikat dan tidak menggunakan dana syarikat untuk membayar cukai pendapatan mereka; peruntukan Kanun Keseksaan berkaitan dengan akuan berkanun pengarah untuk mengesahkan kesahihan akaun syarikat sementara peruntukan ACP berkaitan dengan pengarah yang telah mengelak dari pembayaran cukai dan/atau telah membantu pengelakan cukai. Pengekalan oleh Mahkamah Rayuan atas keputusan Mahkamah Tinggi membawa kepada rayuan semasa oleh TEH Paper dan TEH Holdings di mana persoalan undang-undang yang diajukan adalah: (i) sama ada ianya adalah adil dan saksama untuk menggulung syarikat di bawah s 218(1)(i) dari AS hanya berdasarkan alasan peruntukan undang-undang tersebut telah dilanggar, sekiranya benar-benar berlaku, dapat diatur oleh ketetapan dalam undang-undang yang memperuntukkan hukuman atau denda; dan (ii) sama ada pempetisyen harus diberikan relif ekuiti di bawah s 218(1)(i) AS apabila kebenaran dan kredibilitinya telah dipersoal oleh mahkamah penggulungan. TKK, selain daripada itu, telah mengemukakan dua persoalan undang-undang dalam rayuannya, iaitu: (A) sama ada apabila terdapat permohonan untuk menggulung lebih dari satu syarikat dalam kumpulan syarikat keluarga, tingkah laku setiap syarikat harus diuji secara berasingan atau bersama-sama sebagai satu kumpulan; dan (B) sama ada prinsip-prinsip yang menetapkan permohonan berdasarkan s 181 AS terpakai untuk permohonan penggulungan berdasarkan s 218(1)(i). Dalam tiga petisyennya, TKK, yang merupakan pemegang saham seperti responden individu lain dalam rayuan ini, bergantung kepada fakta yang sama untuk menyatakan bahawa pengarah dalam ketiga-tiga syarikat tersebut telah bertindak demi kepentingan mereka sendiri dan bukannya demi kepentingan anggota secara keseluruhan dan oleh yang demikian telah menjalankan urusan syarikat-syarikat tersebut dengan cara yang tidak adil, tidak saksama dan tidak bermanfaat.

Diputuskan, dengan sebulat suara menjawab persoalan kebenaran yang diajukan oleh TEH Paper dan TEH Holdings secara negatif, membenarkan rayuan mereka dan mengetepikan perintah penggulungan, menolak untuk menjawab persoalan kebenaran yang diajukan oleh TKK dan menolak rayuannya:

(1) Oleh kerana Mahkamah Tinggi mendapati tiada asas untuk aduan dalam

petisyen penggulungan TKK dan bahawa pempetisyen tidak mempunyai kredibiliti dan bahawa petisyen tersebut merupakan penyalahgunaan proses untuk mencapai tujuan jaminan, mahkamah seharusnya menolak petisyen tersebut. Ini bukan situasi di mana penyalagunaan atau pelanggaran undang-undang membentuk asas suatu petisyen di bawah s 218(1)(i) AS (lihat perenggan 118–120).

(2) Sebelum menamatkan perjanjian, membatalkan perjanjian atau menggulung syarikat, mahkamah harus berpuas hati bahawa penyalahgunaan undang-undang atau pelanggaran undang-undang yang berkaitan, atau mempunyai hubungan yang mencukupi, dengan urusan atau perniagaan syarikat dan/atau yang mana syarikat diperbadankan. Tidak kesemua pelanggaran peruntukan undang-undang akan mengakibatkan syarikat digulung walaupun pelanggaran tersebut menyebabkan sanksi jenayah, jika tidak, akan berlaku kekacauan dalam perdagangan dan perniagaan. Mahkamah harus memeriksa dengan teliti undang-undang yang relevan yang diadukan dan menentukan tujuan atau matlamatnya sebelum menyimpulkan satu cara atau cara lain bahawa kontrak, tindakan atau perbuatan yang dimaksudkan tersebut tidak sah oleh pelanggaran tersebut (lihat perenggan 53–54).

(3) Meskipun mahkamah akan bertindak di mana terdapat pelanggaran undang-undang, ianya haruslah di mana pelanggaran tersebut dilakukan secara *ex facie* dan di mana fakta-fakta yang berkaitan dengan penyalahgunaan atau pelanggaran undang-undang itu tidak dapat disangkal. Dalam perkara penggulungan syarikat tunggal, perintah penggulungan hanya boleh diberikan sekiranya penghentian pelanggaran undang-undang yang diadukan hanya dapat dicapai melalui atau dengan penggulungan syarikat tersebut sendiri dan tidak ada jalan atau cara lain yang tersedia melainkan untuk mengulungkan syarikat untuk menghentikan pelanggaran undang-undang (lihat perenggan 49 & 85).

(4) Dalam rayuan semasa, tidak ada syarikat yang ditubuhkan dengan tujuan atau niat tidak sah untuk menyalahi undang-undang, baik Akta Syarikat, Akta Cukai Pendapatan 1967 atau Kanun Keseksaan. Tujuan dan aktiviti TEH Paper dan TEH Holdings malah PCSB tidak dipersoalkan atau diteliti. Mahkamah di bawah gagal mempertimbangkan perkara penting ini. Di mana syarikat ditubuhkan secara penipuan dan merupakan jentera fraud, kewujudannya harus segera dihalang. Dan, dalam erti kata tersebut, mahkamah tidak akan ragu-ragu menggulung mereka untuk menghentikan pelanggaran undang-undang (lihat perenggan 86).

(5) Dalam rayuan semasa, Mahkamah Tinggi telah mengenal pasti pelanggaran oleh syarikat terhadap peruntukan khusus AS, Akta Cukai Pendapatan dan Kanun Keseksaan tetapi gagal untuk memeriksa niat setiap Akta tersebut terhadap s 218(1) dan 218(1)(i). Peruntukan Kanun

Keseksaan dan Akta Cukai Pendapatan sebenarnya berkaitan dengan pelanggaran AS. Seksyen 169 dibaca dengan s 171(1) AS adalah berkaitan tanggungjawab pengarah untuk mengemukakan laporan kewangan yang tepat dan memberikan pandangan yang benar dan adil mengenai urusan syarikat; s 364(2) berkaitan dengan situasi di mana pengarah membuat penyataan palsu berkenaan dengan akaun syarikat sementara s 136 berkaitan dengan penggunaan dana syarikat oleh pengarah untuk membayar cukai pendapatan mereka. Sehubungan dengan pelanggaran tersebut, mahkamah seharusnya mengambil kira s 218(1) dan peruntukan AS yang lain serta niat AS tersebut. Dalam konteks penggulungan, s 218(1)(b), (c) dan (d) secara jelas memberikan jenis atau sifat pelanggaran AS yang membenarkan merit untuk penggulungan. Alasan tersebut tidak harus diperluas. Seandainya ianya telah dimaksudkan sebarang atau kesemua pelanggaran AS akan membawa kepada penggulungan, pasti ada peruntukan yang jelas untuknya. Sebaliknya, hanya pelanggaran terpilih yang dikenal pasti dan terdapat alasan yang baik untuk peruntukan tersebut. Ini adalah situasi yang ditetapkan di mana ia adalah adil dan saksama untuk menggulung syarikat. Mahkamah harus selalu perlahan untuk mengguna pakai alasan 'adil dan saksama', hak untuk menggulung syarikat kerana melanggar peruntukan lain AS kecuali pelanggaran tersebut dapat dikaitkan dengan alasan lain di s 218(1) (lihat perenggan 87–90).

(6) Dalam rayuan semasa, bahkan secara faktual, terdapat kegusaran serius tentang wujudnya 'penyalahgunaan undang-undang'. Pelanggaran dan/atau penyalahgunaan undang-undang yang berkaitan dengan 'dana keluarga dan aktiviti under-counter' dan bagaimana wang dari syarikat keluarga 'dikeluarkan' untuk pelbagai tujuan termasuk untuk pembayaran cukai oleh pengarah. Namun, apabila tuduhan-tuduhan tersebut diperiksa, sudah jelas bahawa wujudnya banyak ketidakpastian, kekaburan dan kekurangan bukti yang sangat penting untuk membuktikan kewujudan dakwaan pelanggaran, kesalahan atau penyalahgunaan undang-undang (lihat perenggan 93).

(7) Pelanggaran AS oleh pengarah, kecuali sekiranya ia jatuh dalam beberapa alasan dalam s 218(1), tidak boleh dianggap dikenakan terhadap syarikat tersebut sendiri demi membentuk asas untuk menggulungnya. Bidang kuasa yang 'adil dan saksama' harus dilaksanakan dengan cermat dan bijaksana, dengan memperhatikan secara khusus sifat penggulungan yang tidak dapat dipulihkan dan drastik dan kerosakan yang tidak dapat diperbaiki tindakan tersebut akan menyebabkan kepentingan pemegang saham, pemiutang dan sejenisnya yang tidak bersalah. Penggulungan bukanlah remedi yang tepat dalam kes semasa apabila terdapat remedi lain yang lebih sederhana, beberapa di antaranya sudah diselesaikan, seperti yang diambil oleh Jabatan Hasil Dalam Negeri. Bagi pempetisyen, TKK, remedinya sebagai pemegang saham minoriti dalam

mengemukakan permohonan di bawah s 181 AS kerana Mahkamah Tinggi mendapati bahawa aduannya sebenarnya adalah penindasan dan beliau sebenarnya inginkan sahamnya dibeli (lihat perenggan 91–92 dan 113).]

Cases referred to

a Company (No 005685 of 1988), ex p Schwarcz (No 2), Re [1989] BCLC 427, Ch D (refd)

Asia Television Ltd & Anor v Viwa Video Sdn Bhd & Connected Cases [1984] 2 MLJ 304; [1984] 2 CLJ 80, FC (refd)

Beca (Malaysia) Sdn Bhd v Tan Choong Kuang & Anor [1986] 1 MLJ 390; [1986] CLJ Rep 64, SC (refd)

Bell Group Finance (Pty) Ltd (in liq) v Bell Group (UK) Holdings Ltd [1996] 1 BCLC 304, Ch D (distd)

Brinsmead (Thomas Edward) & Sons, Re [1897] 1 Ch 45, Ch D (distd)

Chang Yun Tai & Ors v HSBC Bank (M) Bhd & Other Appeals [2011] MLJU 1479; [2011] 7 CLJ 909, FC (refd)

Charles Forte Investments Ltd v Amanda [1963] 2 All ER 940, CA (refd)

Chow Kwok Chuen v Chow Kwok Chi & Another [2008] 4 SLR 362, CA (refd)

Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313; [1995] 4 CLJ 300, FC (refd)

Crigglestone Coal Co Ltd, Re [1906] 2 Ch 327, Ch D (refd)

Curragh Investments Ltd v Cook [1974] 3 All ER 658, Ch D (folld)

Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor & Another Appeal [1981] 1 MLJ 56, PC (refd)

Datuk Ong Kee Hui v Sinvium Anak Muit [1983] 1 MLJ 36, FC (refd)

DHN Food Distributors Ltd and others v London Borough of Tower Hamlets [1976] 3 All ER 462, CA (refd)

Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492; [1973] AC 360, HL (refd)

Foo Jong Wee & Ors v Haji Afifi bin Haji Hassan [2016] MLJU 1673; [2016] 6 CLJ 696, CA (distd)

Glenn Maud Edgeworth Capital (Luxembourg) SARL and another v Maud, Re [2020] EWHC 974, Ch D (refd)

Goodwealth Trading Pte Ltd, Re [1991] 2 MLJ 314, HC (refd)

Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd [2010] 5 MLJ 34, CA (refd)

Hj Afifi bin Hj Hassan v Norman Disney & Young Sdn Bhd & Ors [2014] 7 MLJ 738, HC (refd)

Holman v Johnson (1775) 1 Cowp 341 (refd)

Investment Properties International Ltd, Re 41 DLR (3d) 217 (refd)

JSC Bank of Moscow v Kekhman and others [2014] BPIR 959; [2015] 1 WLR 3737, Ch D (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457; [1989] 1 CLJ Rep 1, PC (refd)

Kin Nam Development Sdn Bhd v Khau Daw Yau [1984] 1 MLJ 256; [1984] 1 CLJ 347, FC (refd)
Lai Kim Loi v Dato Lai Fook Kim & Anor [1989] 2 MLJ 290, SC (refd)
Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281; [1992] 3 CLJ 1667, SC (refd)
Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd [2019] 4 MLJ 141, FC (refd)
London and County Coal Company, In re (1866) LR 3 Eq 355 (distd)
Looh Siong Chee v Numix Engineering Sdn Bhd & Ors and other appeals [2015] 4 MLJ 561, FC (refd)
Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81; [1999] 2 CLJ 997, FC (refd)
MA Clyde v Wong Ah Mei & Anor [1970] 2 MLJ 183, FC (refd)
Migration Solutions Holdings Ltd; Brett v Migration Solutions Holdings Ltd and others, Re [2016] EWHC 523, Ch D (refd)
Palaniappa Chettiar v Arunasalam Chettiar [1962] 1 MLJ 143; [1962] 1 LNS 115, PC (refd)
Patel v Mirza [2017] 1 All ER 191, SC (refd)
Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor [2018] 4 MLJ 1, FC (refd)
Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals [2018] 1 SLR 763, CA (refd)
Randhir Singh a/l Bhajnik Singh v Sunildave Singh Parmar (the administrator of the estate of K Surjit Kaur a/p Gean Kartar Singh, deceased) [2018] 12 MLJ 166; [2018] 7 AMR 237, CA (refd)
Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (refd)
St John Shipping Corporation v Joseph Rank Ltd [1956] 3 All ER 683, QBD (refd)
Tahansan Sdn Bhd v Tay Bok Choon [1985] 1 MLJ 58, FC (refd)
Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Holdings Sdn Bhd & Ors & Another Case [2015] 1 LNS 1385, HC (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433, PC (refd)
Tekun Nasional v Plenitude Drive (M) Sdn Bhd and other appeals [2018] 4 MLJ 567, CA (refd)
Thong Foo Ching & Ors v Shigenori Ono [1998] 4 MLJ 585; [1998] 4 CLJ 674, CA (refd)
Thunder Cats Investment 92 (Pty) Ltd v Nkonjane Economic Prospecting & Investments (Pty) Ltd 2014 5 SA 1 (CA) (refd)
Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd [1995] 1 MLJ 769, SC (refd)
Tourmaline Ltd, Re [2000] 4 HKC 348 (refd)
Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410, HC (refd)

Zung Zang Holdings Sdn Bhd v Zung Zang Trading Sdn Bhd [2019] MLJU 2063, CA (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 (repealed by the Financial Services Act 2013)
Companies Act 1948 [UK] s 407
Companies Act 1965 (repealed by the Companies Act 2016) ss 130A, 136, 169, 171, 171(1), 181, 211, 212, 213, 214, 215, 216, 217, 217(1), 218, 218(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h), (1)(i) (1)(j), (1)(k), (1)(l), (1)(m), (1)(n), 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 364, 364(2) Part X
Companies Act 2008 [SA] s 344(h)
Companies Act 2016 ss 198, 198(3), 198(7)
Contracts Act 1950 ss 24, 24(b)
Copyright Act 1969 ss 6(1)(a), 15(1)(a)
Courts of Judicature Act 1964 s 18
Evidence Act 1950 ss 17, 31
Films (Censorship) Act 1952 ss 9(2), 9A(2)
Housing (Control and Licensing of Developers) Rules 1980 (GNS 17 of 1980) (repealed by the Housing Development (Control and Licensing) Rules 2008
Housing (Control and Licensing of Developers) Enactment 1978 (No 24 of 1978)
Housing Developers (Control and Licensing) Act 1966
Housing Developers (Control and Licensing) Rules 1970 (repealed) rr 11(1), 17
Income Tax Act 1967 s 114
Insolvency Act 1986 [UK] s 125(1)
Insurance Act 1996 (repealed by the Financial Services Act 2013)
Islamic Banking Act 1983 (repealed by the Islamic Financial Services Act 2013)
National Land Code s 340(2)
Penal Code ss 193, 199, 200
Real Property Gains Tax Act 1976
Registration of Engineers Act 1967
Rubber Regulations (No 17 of 1934)
Stamp Act 1949

Appeal from: Civil Appeal Nos P-02(A)-1418–09 of 2015, P-02(A)-1420–09 of 2015 and P-02(A)-1419–09 of 2015 (Court of Appeal, Putrajaya)

Gopal Sri Ram (Marcus Lee, Karluis Quek, Karin Lim Ai Ching, Suppiah a/l Arumugam, Ong Swee Long and Ong Kang Nyong with him) (Presgrave & Matthews) in Civil Appeal Nos 02(f)-5–02 of 2017(P), 02(f)-12–02 of 2017(P) and 02(f)-6–02 of 2017(P) for the appellants.

Malik Imtiaz Sarwar (Esther Geetha Jayaraja, Alia Ilani Nasution & Chan Wei June with him) (Chew Das & Jayaraja) in Civil Appeal Nos 02–13–02 of 2017(P) and 02–14–02 of 2017(P) for the appellants.

Malik Imtiaz Sarwar (Esther Geetha Jayaraja, Alia Ilani Nasution and Chan Wei June with him) (Chew Das & Jayaraja) in Civil Appeal Nos 02(f)-5–02 of 2017(P) and 02(f)-12–02 of 2017(P) for the respondents.

Tan Swee Cheng (SC Tan) in Civil Appeal No 02(f)-6–02 of 2017(P) for the first respondent.

Malik Imtiaz Sarwar (Esther Geetha Jayaraja, Alia Ilani Nasution and Chan Wei June with him) (Chew Das & Jayaraja) in Civil Appeal No 02(f)-6–02 of 2017(P) for the second, third, fourth and fifth respondents.

Gopal Sri Ram (Marcus Lee, Karluis Quek, Karin Lim Ai Ching, Suppiah a/l Arumugam, Ong Swee Long & Ong Kang Nyong with him) (Presgrave & Matthews) in Civil Appeal Nos 02–13–02 of 2017(P) and 02–14–02 of 2017(P) for the respondents.

Mary Lim FCJ (delivering judgment of the court):

[1] The five appeals before us concern the law on winding up of companies on the ground that it is just and equitable under s 218(1)(i) of the Companies Act 1965 to wind up the target companies. Three appeals are brought by the petitioner who did not succeed in winding up all three companies that he had targeted whilst two other appeals are by the two companies that were wound up as a result of the petitions.

[2] A total of four questions are posed by the two sets of appellants in these appeals:

Petitioner's appeals

Civil Appeals Nos 02(f)-5–02 of 2017(P) and 02(f)-6–02 of 2017(P) & 02(f)-12–02 of 2017(P):

(a) where there are applications to wind up more than one company in a group of family companies, is the conduct of the parties to be tested separately in respect of each company or as a whole having regard to the decisions in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 and *DHN Food Distributors Ltd and others v London Borough of Tower Hamlets* [1976] 3 All ER 462; and

(b) whether the principles governing an application made under s 181 of the

Companies Act 1965 are applicable to an application to wind up a company under s 218(1)(i) of the said Act having regard to the decision of the Federal Court in *Looh Siong Chee v Numix Engineering Sdn Bhd & Ors and other appeals* [2015] 4 MLJ 561.

Wound up companies' appeals

Civil Appeals Nos 02(f)-13–02 of 2017(P) & 02(f)-14–02 of 2017(P)

(a) whether a company could be wound up by a 'shareholder' of the said company under s 218(1)(i) of the Companies Act 1965 merely on the grounds of non-compliance or breach by the directors (where no prosecution whatsoever was ever taken against the said company by the authorities in any court) of ss 169, 364(2), 136 of the Companies Act 1965 and ss 199, 200 and/or 193 of the Penal Code and s 114 of the Income Tax 1967, which if proven, can nonetheless be regularized by provisions of the statutes by way of penalty/fine; and

(b) whether a petitioner shall be allowed with equitable relief under s 218(1)(i) of the Companies Act 1965 when the petitioner's truthfulness and credibility have been impugned by the winding up court.

BACKGROUND FACTS

[3] The full factual background which led to the winding up of Tan Eng Hong Paper & Stationery Sdn Bhd ('TEH Paper') and Tan Eng Hong Holdings Sdn Bhd ('TEH Holdings'), the appellants in Civil Appeals Nos 02(f)-13–02 of 2017(P) and 02(f)-14–02 of 2017(P), and the dismissal of the winding up petition against Peace Centre Sdn Bhd ('PCSB'), may be found in the grounds of decision of the learned judge at the High Court reported in *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Holdings Sdn Bhd & Ors & Another Case* [2015] 1 LNS 1385. For the purposes of these appeals, suffice that we summarize those facts as thus.

PARTIES

[4] For ease of reference, we shall refer to the parties as they were at the High Court.

[5] The late Tan Boon Kak and his wife, Ong Chooi Tee, had six sons. They also had daughters but they and their families are not involved in the litigation before us. All six sons, whether themselves directly or their families are however, involved. The learned High Court judge referred to them collectively as the 'Tan families' and/or by reference to their position in those six families.

[6] The second, third and fourth respondents are respectively, the third, fifth and sixth sons. The fifth respondent is the eldest son of the deceased second son. Because of the nature of the allegations and the role that he holds in the target companies, the fourth respondent and the sixth son, Tan Seng Kow, shall be referred to by his initials, 'TSK'.

[7] The petitioner, Tan Keen Keong @ Tan Kean Keong ('petitioner') is from the first family. In support of his petitions, the petitioner relied on, inter alia, the evidence of Tan Choo Leong ('TCL') who is from the fourth family. The petitioner and TCL are nephews of the second and third respondents and of TSK, and cousins of the fifth respondent.

[8] Although TCL was not a party to any of the petitions, he testified for the petitioner as PW4, one of nine witnesses called by the petitioner. He was described by the learned judge as having played 'a key role during the trial in terms of putting together the building blocks and advancing/articulating the cases on behalf of the petitioner'. In fact, he together with his family were seen as the 'directing minds behind the petition' and when the petition against PCSB was dismissed, he was ordered to bear costs personally together with the petitioner.

[9] The subject companies of three separate winding up petitions, are part of a group of companies comprising at least thirteen companies, owned by the six Tan families. TEH Holdings was incorporated on 8 November 1976. It was then known as Tan Eng Hong Realty Sdn Bhd. In 1982, it underwent a name change. Its principal object was for investment holdings and letting of properties. TEH Paper was incorporated on 31 December 1982. It manufactures paper and stationeries. PCSB was incorporated on 12 April 1983.

[10] The petitioner, TCL and the other individual respondents cited in the three petitions are shareholders of the subject companies while TSK is also a director in these companies and since 1999, their 'deemed managing director'.

[11] The petitioner, the appellant in Civil Appeals Nos 02(f)-5–02 of 2017(P), 02(f)-6–02 of 2017(P) and 02(f)-14–02 of 2017(P), moved three separate petitions to wind up the three companies, citing the same legal basis, that is, s 218(1)(f) and (i) of the Companies Act 1965. In substance, he alleged that the directors had acted in their own interests rather than in the interests of the members as a whole; and that it is just and equitable to wind up the companies. The petitioner relied on similar factual substratum for all three petitions.

[12] According to the petitioner, these three companies ought to be wound up because their affairs had been conducted in an unfair, unjust and inequitable manner by the persons in control of the companies. Specifically, the petitioner alleged that:

(a) contrary to an agreement and understanding between the shareholders of TEH Holdings that its business be carried on as a family business and as a quasi partnership based on mutual trust and confidence with each family having a representative decided solely by that family, he had been denied his legitimate rights and expectations in TEH Holdings;

(b) the affairs of these companies had been conducted in an unfair, unjust and inequitable manner by the persons in control;

(c) he had not been re-appointed as director after 1996;

(d) he had been excluded from their management;

(e) he had not been paid any reasonable dividend;

(f) TEH Holdings paid salaries, bonuses, allowances and other benefits to the other families but not to him;

(g) the land belonging to the company had been let out at grossly undervalued rates;

(h) directors, especially TSK, acted in their/his own interest(s) as opposed to those of the companies;

(i) financial affairs of TEH Holdings' subsidiary, Perusahaan Konkrit Merdeka Sdn Bhd ('PKM') were conducted in a wrongful and non-transparent manner as evidenced by a penalty of RM2,334,550 imposed by the Inland Revenue Board in 1996;

(j) these companies were involved in 'certain nefarious accounting practices which have been described as 'under counter activities' carried out to deceive the Inland Revenue Department ('IRD') as to the true income of TEH Paper and TEH Holdings and its subsidiaries', namely PKM and Perusahaan Konkrit Merdeka (KL) Sdn Bhd ('PKM (KL)');

(k) main assets of TEH Paper were destroyed in a fire; and

(l) there was a breakdown of mutual confidence and good faith amongst the Tan families and its directors as well as amongst the shareholders.

[13] The petitioner claimed that there was an agreement and understanding between the shareholders of TEH Holdings that it was a quasi partnership based on mutual trust and confidence as its business was carried on as a family business. This agreement and understanding extended to TEH Paper and PCSB. He also claimed the existence of a 'family fund', that monies of TEH

Paper and TEH Holdings and its subsidiaries had been siphoned into this 'family fund' due to under counter activities, and that the 'family fund' had been wrongfully used.

[14] His specific complaint against PCSB was that despite having low overheads, PCSB earned meagre rental incomes and had also not declared dividends. The petitioner put this down as to how the expenses of the other companies had been incorporated into PCSB's, thus 'hijacking' its profits. The petitioner claimed that these were all done to oppress the first family which, through him, was the largest shareholder of PCSB.

[15] The petitions were opposed, to put it mildly, with the respondents alleging:

(a) abuse of court process;

(b) petitions were for collateral purpose;

(c) selective prosecution in that one Tan Choo Keng of the fourth family, TCL's brother, was not cited as respondent in the petitions;

(d) delay, waiver, acquiescence and/or limitation and laches;

(e) no quasi partnership;

(f) no legitimate expectation to be director;

(g) no legitimate right or expectation in the participation of the management of the companies;

(h) no dividend declared partly because of the uncertainty of shareholding within the petitioner's family members;

(i) rentals at discounted rate were not grossly undervalued while the valuation report prepared was unsafe to be relied on;

(j) there was no 'family fund' in PCSB;

(k) there was no destruction or loss of the corporate substratum; and

(l) it was not just and equitable to wind up the companies.

[16] In relation to the 'family fund', the respondents explained that this fund existed even during the time when TCL's father, Tan Seng Jin ('TSJ') was the 'deemed managing director' until his demise in 1999 and this role was then assumed by TSK. The respondents further explained that this fund provided for various allowances such as marriage expenses, scholarships, funeral expenses, medical expenses. The main source of the fund was derived from sale of waste paper which were not declared by TEH Paper. Monies for this fund were initially held in an account in the joint names of TCL's father and some

other members from initially three of the Tan families. One of the joint account holders was Tan Choo Keng, a brother of TCL. The allegations of siphoning off monies by the current directors for their personal gain was specifically denied.

[17] In 1992/1993, TEH Paper and PKM were raided by the Inland Revenue Department. In 1995, PKM was imposed a penalty and in the following year, TEH Paper was similarly imposed a penalty. Both companies paid the penalties.

DECISIONS OF THE HIGH COURT AND COURT OF APPEAL

[18] After a lengthy trial with witnesses led by both the petitioners and the respondents, the petitions to wind up TEH Paper and TEH Holdings were allowed whereas the petition to wind up PCSB was dismissed. The learned trial judge made specific findings in respect of the petitioner himself as well as on the grounds relied on.

[19] In relation to the petitioner himself, the learned judge found that the petitioner had locus standi to file the petitions given that he was a shareholder in his own name; quite aside from holding shares on trust for members of his family.

[20] His Lordship, however, found the petitioner's evidence and those of his main witness, TCL, not credible and very much wanting. More significantly, the learned judge found presence of abuse of process as the petitions were filed for a collateral purpose and on the instigation and funding by TCL and his mother; that the petitioner was a 'mere tool', 'a mere proxy for TCL and the fourth family'; that the real purpose behind the petitions was 'to get back their shares and the lands and to see that TSK resigned from his position as deemed managing director'.

[21] As for the grounds relied on, the learned judge concluded that there was no basis for the petitioner's complaints with his questionable credibility. In any case, the petitioner was not in the position to make his complaints, particularly about being excluded from the management of the companies as he was never in management to start with. According to the learned judge, the companies were not quasi partnerships; and any earlier intention had since been displaced by how the companies had evolved over the passage of time. In the case of TEH Holdings, its shareholders were furthermore no longer confined to members of the Tan families but included persons outside the Tan families.

[22] The High Court was also disinclined to allow the petitions after finding that there was 'considerable and undue and inordinate delay' on the petitioner's part in moving the court for the petitions; finding his 'lack of education ...

neutralised by the fact that he had sought legal advice in the 1990s. As such, his inaction for all these years right up to the time he filed the petitions speaks heavily against him. His inaction is fatal' (see para 151). Citing *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326, His Lordship inferred that the petitioner 'had acquiesced to the state of affairs' with the 'inordinate and inexcusable' delay in 'prosecuting his complaints against the respondents'.

[23] Despite the above findings, the learned judge proceeded to allow the winding up petitions against TEH Paper and TEH Holdings holding that these companies, directly or through their subsidiaries, had contravened the Companies Act 1965, and through the use of the family fund, had committed illegality. The High Court cited the Court of Appeal decision in *Hj Afifi bin Hj Hassan v Norman Disney & Young Sdn Bhd & Ors* [2014] 7 MLJ 738 in support. The petition in respect of PCSB was however, dismissed after the learned judge found that the company was not engaged in such activities. The specific allegation of low market rentals was rejected for want of proof whilst the complaint of non-declaration of dividends was dismissed on the basis that this was a management decision and 'very much' up to the discretion of the board of directors of PCSB.

[24] Both the petitioner and the respondents appealed. On 7 June 2016, the Court of Appeal dismissed all the appeals brought, affirming the decisions of the High Court.

[25] There are no written grounds of decision from the Court of Appeal but this is no impediment to the conduct of these appeals. The parties have also decided to proceed with their respective appeals without any written grounds.

OUR DECISION

[26] We propose to take the questions posed by the wound up companies first; our deliberations and answers to these appeals will have a direct bearing on the questions posed by the petitioner. The questions posed concern the correctness of the decisions to wind up TEH Paper and TEH Holdings:

> Whether a company could be wound-up by a 'shareholder' of the said company under section 218(1)(i) of the Companies Act 1965 merely on the grounds of non-compliance or breach by the directors (where no prosecution whatsoever was ever taken against the said company by the authorities in any Court) of sections 169, 364(2), 136 of the Companies Act 1965 and sections 199, 200 and/or 193 of the Penal Code and section 114 of the Income Tax 1967, which if proven, can nonetheless be regularized by provisions of the statutes by way of penalty/fine.

[27] As evidenced from what has been narrated above, the learned judge had found everything that could conceivably be wrong with the petitions and the

petitioner, that the petitioner's real intention was to obtain a shares buy out; that he was there for a collateral purpose, posing as a front for the real instigators of the petitions, namely TCL and his family; that there was abuse of process; that he was not a credible witness; that he had slept on his rights; and that in fact, had himself condoned the matters complained of and forming the basis of the petitions. His Lordship had supported his findings from both the oral testimonies and the documentary evidence led; stating that 'ordinarily, these petitions would have been struck out and dismissed as being an abuse of process'. Yet, in quite categorical terms, His Lordship went on to pronounce that 'there is a problem and it is to do with the issue of illegality vis a vis TEH Holdings and TEH Paper'. And, from there, His Lordship considered the matter of illegality which led to the orders for winding up.

[28] The contraventions and illegality are discussed at paras 198–234 of the grounds under the sub topic, 'Illegality'. Now, what exactly are the target companies alleged to have committed and which occasioned the learned judge to make strong remarks such as the 'gross violation of the provisions of the Companies Act 1965 and other laws'; 'contravention of, inter alia, the Companies Act 1965 and illegality'; 'illegalities cannot be sanitized or washed away by any form or extent of knowledge, acquiescence or participation on the part of the petitioner or by TCK or his family members'; the 'illegality cuts through these counter arguments'; that 'once illegality is proven or there is an admission as to illegality, then it matters not whether the petitioner knew about it or not, except that perhaps it may be relevant when it comes to the issue of costs'?

[29] The answer to this poser may be found specifically at paras 207–211, 213, 217–219, 222–225, 227, 228, 230–234 of the judgment:

> 207. For present purposes, what is important is the indisputable fact that illegality (family fund and under counter-activities) was carried out in a most egregious and blatant manner and is in all probability, still being carried out. One of the troubling issues is the role of an entity known as Centrum Piler Engineering of which TSK's son was a co-owner. The other owner or partner was Goh Chin Kooi. Centrum Piler Engineering was a conduit for the siphoning of funds and it ceased business very shortly after the Petitions were served. It was suggested for the Petitioner that Centrum Piler Engineering ceased business because the owners knew that they were involved in wrongdoing ie siphoning funds through PKM. This was denied. They said that the co-owner of Centrum Piler Engineering, Goh Chin Kooi was annoyed that Centrum Piler Engineering was dragged into this litigation and so he wanted the business to cease. However, Goh Chin Kooi did not give evidence.
>
> 208. Also, another entity was set up, namely Pen-concrete Sdn Bhd, which remained 'dormant' but appeared to have a fixed deposit of RM3,000,000. This raises suspicion as to whether these are also part of the profits of TEH Holdings which were 'parked' in the dormant company.

209. The Respondents maintain that TEH Paper/PKM have been penalised by IRD and should not be penalised again by a winding up order. It was said that those are matters of history which have all been resolved. However, there is evidence that there were about seven bank accounts through which the family fund was operated. But, there is evidence of a second raid by IRD. However, the outcome of that raid was not made known to the Court.

210. The entire bank statements for these family fund accounts could have been, but were not produced. I am therefore compelled to draw an adverse inference under section 114(g) Evidence Act 1950 against the Respondents for the failure to produce these bank statements. The failure to produce the bank statements suggests that the Respondents have something to hide. In all likelihood these accounts will show a different picture as to the amount of profits that were and are still in these accounts. The inference which I have made is that the under counter activities have not ceased.

211. The fact that about a year after the Petitions were served, resolutions were passed to cease the practice of channelling of companies monies into the family fund, suggests that the practice continued even after the Petitions were served. Although after the Petitions were served, Centrum Piler Engineering ceased business, another entity 'SK Piles' was formed. TSK and his son Kenny Tan (DW6) were admittedly, the co-owners of SK Piles.

...

213. As such, I am in agreement with the submissions made by counsel for TSK that the illegal channelling or siphoning of companies monies into the family fund is not to be equated with TSK or the other Respondents helping themselves to the monies sitting in the fund or in the accounts. But I will venture to state that it is an open question as to whether there were defalcations of the type that is being alleged by the Petitioner, but that will have to sic investigated by another authority. For now, the issue is one of illegality and whether it is just and equitable that TEH Paper and TEH Holdings, should be wound up because of the illegality which has been admitted. As stated earlier, the fact that the accounts of TEH Paper and in the case of TEH Holdings, the consolidated accounts are false, has been proven satisfactorily. This has various implications from the perspective of breach of various statutory provisions, which I will now turn to.

...

217. It has been established during the trial that there are serious discrepancies in the audited accounts of TEH Paper and TEH Holdings. The accounts of these companies are not fair and accurate and they are also misleading as they do not reflect the funds that were diverted or channelled into the under counter accounts. In fact, the offices of TEH Paper and TEH Holdings (PKM) had been raided by the IRD for tax avoidance and penalties had been paid to the IRD by the companies. There was also a second raid by IRD.

218. In the light of the manner in which the Second to Fifth Respondents had conducted the two companies, especially in terms of the preparation of accounts, the view I hold is that it is just and equitable to wind up the companies so that a full and independent investigation can be carried out in respect of the accounts of these two companies ...

219. In the circumstances, it became clear from TSK's evidence that there was a breach of section 169 of the Companies Act by the Second to Fifth Respondents as the accounts of the two companies do not give a true and fair view of the state of affairs of the companies and the directors of the companies are guilty of an offence pursuant to section 171(1) of the Companies Act 1965 ...

...

222. To the extent that the Second to Fifth Respondents have made false statements pertaining to the accounts of TEH Paper and TEH Holdings (through falsification of the accounts of PKM/PKM(KL)), they may be guilty of an offence pursuant to section 364(2) of the Companies Act.

223. In this regard, section 364(2) Companies Act 1965 provides that ...

224. In this case, every time the accounts of the TEH Paper and TEH Holdings were submitted, the Second to Fifth Respondents had sworn Statutory Declarations to confirm the correctness of the accounts. Nevertheless, the Second to Fifth Respondents being the directors of these companies had sworn false statutory declaration to confirm the correctness of the accounts of these companies although they are fully aware that the accounts are not fair and accurate and are in fact misleading. The declarations sworn by them are deemed to be declarations referred to in sections 199 and 200 of the Penal Code. (See section 3 of the Statutory Declarations Act 1960) which provides that ...

225. Therefore, the Second to Fifth Respondents would be liable to be punished as if they had given false evidence pursuant to sections 199 and 200 of the Penal Code. Section 199 Penal Code provides that ...

227. The other offence for which the Second to Fifth Respondents may be liable is an offence under section 193 of the Penal Code which provides ...

228. The next significant offence is one which relates to tax evasion. Here, the Second to Fifth Respondents have evaded taxes and/or assisted in the tax evasion and would be guilty of the offence pursuant to section 114(g) of the Income Tax Act 1967 ...

...

230. The evidence at trial showed that the Second to Fifth Respondents had used the funds of TEH Paper and TEH Holdings (through PKM/PKM (KM)) to pay their income tax. This is expressly prohibited under section 136 of the Companies Act 1965. This is expressly prohibited under section 135 of the Companies Act 1965 which provides ...

231. In the circumstances, there is grave misconduct by the Second to Fifth Respondents for their rampant illegal under counter activities and also for swearing false declarations in confirming the correctness of the accounts of the two companies even though they knew that the accounts are inaccurate and not fair as it did not reflect the under counter activities. Besides, the Second to Fifth Respondents had also misappropriated the assets of the two companies and created fictitious documents to justify the accounts.

232. The taking of profits from a company in such circumstances is patently a criminal offence of misappropriation. In *Lai Ah Kau* ...

233. It was submitted for the Petitioner that apart from their criminal liability for the inaccurate and unfair accounts, the Second to Fifth Respondents are also liable for breach of trust and fiduciary duties for causing the company accounts to be misstated. See Walter Woon ...

234. It was submitted that in light of the illegal activities carried out by the Second to Fifth Respondents, the Court must act on and address the issue of illegality. This is not only to enforce the Petitioner's rights but more importantly, to uphold the law. It is also submitted that on the ground of illegality alone, it is just and equitable to wind up the companies as it would be in the interest of the public to stop the under counter activities and uphold the law.

[30] The court then went on to discuss and apply the Court of Appeal's decision in *Hj Afifi bin Hj Hassan v Norman Disney & Young Sdn Bhd & Ors* [2014] 7 MLJ 738, that the court may wind up a company where illegality is shown notwithstanding knowledge or participation by the petitioner and his witnesses and, amongst others, made the following conclusions:

239. TSK also conceded that the channelling of company's funds into a family fund violates Article 138 of the company's M&A. TSK also admitted that by having a 'non company account' (ie family fund account), there was 'tax evasion' and 'false accounting' (See TSK's evidence on 18 November 2013 — Day 34 of the trial).

240. Further, TSK admitted that TEH Holdings financial statement are false because the accounts are false ...

241. In my view, the illegality (tax evasion and false accounting etc) has infected TEH Paper and TEH Holdings as well, although the main conduit for illegality was PKM and PKM (KL) which are subsidiaries of TEH Holdings. Since TSK has confirmed during cross-examination that the financial statements of TEH Holdings are 'false', it would be untenable for the Respondents to suggest that TEH Holdings is unaffected or untainted by the illegality which has been unreservedly and unequivocally admitted to by TSK during cross-examination.

[31] According to the learned judge, 'based on the issue of illegality, a term which I have used generically to cover violations of various statutory provisions discussed earlier, I find that it is not just appropriate but also imperative that I should order the winding up of TEH Paper and TEH Holdings'.

[32] The various statutory provisions which were said to have been contravened are:

(a) s 169 read with s 171(1) of the Companies Act 1965 on the duty of the directors to produce financial reports which are accurate and give a true and fair view of the state of affairs of the companies;

(b) s 364(2) of the Companies Act 1965 where the directors made false statements on the companies' accounts;

(c) s 136 of the Companies Act 1965 where the directors used company funds to pay their income tax;

(d) ss 193 and 199 of the Penal Code where directors had sworn statutory declarations to confirm correctness of accounts; and

(e) s 114 of the Income Tax Act 1967 where directors have evaded taxes and/or assisted in tax evasion.

[33] Ultimately, the learned judge wound up TEH Holdings and TEH Paper because it was just and equitable to do so due to the presence of illegality. The illegality was established through 'admissions' by TSK during cross-examination and in a phone text message from TSK to TCL on 2 July 2009 — that TSK 'admitted that because of the under counter activities and siphoning of funds, the declarations that were made in relation to the accounts for TEH Paper/TEH Holdings and the accounts themselves were false'. Consequently, the learned judge opined that it was 'fair to say that the petitions vis a vis TEH Paper and TEH Holdings (through PKM as its subsidiary) are mired in contravention of, inter alia, the Companies Act 1965 and illegality); and that 'these admissions would mean that there has been gross violation of the provisions of the Companies Act 1965 and other laws. In my view, these illegalities cannot be sanitized or washed away by any form or extent of knowledge, acquiescence or participation on the part of the petitioner or by TCK or his family members' — see paras 201–204.

THE 'JUST AND EQUITABLE' GROUND

[34] The Companies Act 1965, an act relating to companies has 374 sections organised into 12 Parts and within each Part, Divisions with their particular provisions. Amongst others, the Act maps up the incorporation of corporate soles, how companies are to be constituted, their powers, shares, management and administration of companies, accounts and audits etc, with Part X dedicated to winding up. Part X comprised ss 211–318; from presentation of petitions for winding up to the final dissolution of the companies, including unregistered companies. These appeals pertain to matters that arose at the first stage of the winding up process.

[35] Section 211 provides that companies may be wound up either voluntarily or by the court. Where it is on application to the court, depending on the circumstances or ground(s) relied on, the petition may only be presented by the persons set out in s 217(1). Under s 218(1), there are 14 grounds upon which a petition for winding up may be moved, and not all these grounds are related to solvency of the company:

Section 218 Circumstances in which company may be wound up by Court.

(1) The Court may order the winding up if:

(a) the company has by special resolution resolved that it be wound up by the Court;

(b) default is made by the company in lodging the statutory report or in holding the statutory meeting;

(c) the company does not commence business within a year from its incorporation or suspends its business for a whole year;

(d) the number of members is reduced in the case of a company (other than a company the whole of the issued shares in which are held by a holding company) below two;

(e) the company is unable to pay its debts;

(f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members;

(g) an inspector appointed under Part IX has reported that he is of opinion:

(i) that the company cannot pay its debts and should be wound up; or

(ii) that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up;

(h) when the period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, occurs on the occurrence of which the memorandum or articles provide that the company is to be dissolved;

(i) the Court is of opinion that it is just and equitable that the company be wound up;

(j) the company has held a licence under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983, and that licence has been revoked or surrendered;

(k) the company has carried on Islamic banking business, licensed business, or scheduled business, or it has accepted, received or taken deposits in Malaysia, in contravention of the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989, as the case may be; or

(l) the company has held a licence under the Insurance Act 1996 and:

(i) that licence has been revoked;

(ii) Bank Negara Malaysia has petitioned for its winding up under subsection 58(4) of the Insurance Act 1996; or

(iii) an order under paragraph 59(4)(b) of the Insurance Act 1996 has been made in respect of it;

(m) the company is being used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia; or

(n) the company is being used for any purpose prejudicial to national security or public interest.

[36] Only two grounds relate to the inability of the company to pay its debts — see s 218(1)(e) and (g). The rest of the grounds deal with compliance issues (s 218(1)(b), (c), (d)), deliberate decisions to wind up (s 218(1)(a) and (h)); complaints against the directors (s 218(1)(f)); licensing issues or breaches of specific legislation such as the Banking and Financial Institutions Act 1989 ('the BAFIA'), Islamic Banking Act 1983, Insurance Act 1996 (s 218(1)(j), (k), (l)) or where the company is used for unlawful purposes (s 218(1)(m) and (n)).

Where the company concerned is licensed under BAFIA or Insurance Act, the petition may only be moved by Bank Negara Malaysia or the Registrar of Companies — see ss 217(1) read with 218(1).

[37] The petitioner relied on s 218(1)(f) and (i) in all three petitions. From the memorandum of appeal and from the questions framed, the ground under s 218(1)(f) is not pursued. We shall therefore confine our deliberations under s 218(1)(i), the just and equitable circumstance.

[38] The 'just and equitable' ground is not dependent on establishment of insolvency although it is frequently relied on as an additional or alternative ground; in fact it is despite the company being solvent that there are nevertheless satisfactory reasons for the court to form an opinion and exercise its discretion that it is just and equitable to order a winding up. This is to be distinguished from 'rolling up' a petition with say, a petition under s 181 of the Companies Act 1965; or not even specifying any ground — see *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 SC.

[39] The term 'just and equitable' is also not defined in the Act. The ambit or scope of this ground was however discussed in the locus classicus of *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492; [1973] AC 360, dealing with the English equivalent provision of our s 218(1)(i). The wide discretion in s 218(1)(i) was confirmed in the Privy Council decision of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; and recently in the Federal Court's decision of *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1. See also *Zung Zang Holdings Sdn Bhd v Zung Zang Trading Sdn Bhd* [2019] MLJU 2063 (CA).

[40] Prior to *Ebrahimi*, the term was interpreted narrowly. In *Ebrahimi*, that

approach was rejected. Lord Wilberforce said:

> There are two other restrictive interpretations which I mention to reject. First, there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. *Illustrations may be used, but general words should remain general and not reduced to the sum of particular instances*. Secondly, it has been suggested and urged upon us, that (assuming the petitioner is a shareholder and not a creditor) the words must be confined to such circumstances as affect him in his capacity as shareholder. I see no warrant for this either. No doubt, in order to present a petition, he must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company, or, in a case such as the present, with the other shareholders.

[41] In *Ebrahimi*, the just and equitable ground was applied in a quasi-partnership situation; where the Privy Council explained that the basis allowed the court to subject the exercise of legal rights by one party to equitable considerations such that it makes the insistence on those legal rights or the exercise of such rights, unjust or inequitable; and 'that the only just and equitable course was to dissolve the association'. Because of this, it is often mistakenly argued that the 'just and equitable' ground can only be deployed in quasi partnerships or where at least one of the factors or elements identified in *Ebrahimi* is established.

[42] Fortunately, this argument was rejected in *Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd* [1995] 1 MLJ 769 where the Supreme Court agreed with the High Court's interpretation of the judgment of Lord Wilberforce in *Ebrahimi* that '… It is not essential and therefore not a condition that before the *Ebrahimi* principles can be applied, the elements or at least one of the elements mentioned by Lord Wilberforce must be present. To interpret in the way contended by the learned counsel would be putting something in the judgment which is not there'. We add that the equitable considerations in *Ebrahimi* were intended only as illustrations of circumstances where the just and equitable ground may apply. This ground is of wide and general import and it is met by sufficiency of context, facts and circumstances available for the trial judge to form the requisite opinion.

[43] Similar views have also been expressed in *Foo Jong Wee & Ors v Haji Afifi bin Haji Hassan* [2016] MLJU 1673; [2016] 6 CLJ 696; and in other jurisdictions — see *Re Migration Solutions Holdings Ltd; Brett v Migration Solutions Holdings Ltd and others* [2016] EWHC 523; *Re a Company (No 005685 of 1988), ex p Schwarcz (No 2)* [1989] BCLC 427; *Re Tourmaline Ltd* [2000] 4 HKC 348; *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ 314; *Chow Kwok Chuen v Chow Kwok Chi & Another* [2008] 4 SLR 362; *Thunder Cats Investment 92 (Pty) Ltd v Nkonjane Economic Prospecting & Investments (Pty) Ltd* 2014 5 SA 1 (SCA). The Court of Appeal of Singapore in *Chow Kwok*

Chuen decisively rejected the proposition that *Ebrahimi* 'was only to be applied in situations of quasi-partnership'; while the Supreme Court of South Africa opined in *Thunder Cats Investment 92*, on the interpretation of its equipollent provision as follows:

> A winding up on this basis 'postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding up'. The subsection is not confined to cases which were analogous to the grounds mentioned in other parts of the section. Nor can any general rule be laid down as to the nature of the circumstances that had to be considered to ascertain whether a case came within the phrase. There is no fixed category of circumstances which may provide a basis for a winding up on the just and equitable ground. In *Sweet v Finbain* it was said:
>
> > The ground is to be widely construed; it confers a wide judicial discretion, and it is not to be interpreted so as to exclude matters which are not ejusdem generis with the other grounds specified in s 344. The fact that the courts have evolved certain principles as guides in particular cases, or examples of situations where the discretion to grant a winding up order will be exercised, does not require or entitle the court to cut down the generality of the words 'just and equitable'.

[44] More significantly, the Supreme Court added 's 344(h) gave the court a wide discretion in the exercise of which certain other sections of the Act had to be taken into account'. The breadth of application of the just and equitable ground was also discussed in *Gulf Business Construction (M) Sdn Bhd v Israq Holding Sdn Bhd* [2010] 5 MLJ 34 where the Court of Appeal set out a non-exhaustive list illustrating how this ground may be met:

> [23] What is just and equitable would vary from case to case. Thus, a company may be wound up where it is just and equitable that the company should be wound up. So many reasons can be advanced to wind up a company under the just and equitable principle, and the following illustrations would suffice:
>
> (a) where the substratum of the company has gone (*Galbraith v Merito Shipping Co Ltd* 1947 SC 446; *Re Kitson & Co Ltd* [1946] 1 All ER 435 (CA); *Re Mediavision Ltd* [1993] 2 HKC 629; *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 and *Re Goodwealth Trading Pte Ltd* [1991] 2 MLJ 314);
>
> (b) where the company's main object for its existence has lapsed (In re *Haven Gold Mining Company* (1881–82) 20 Ch D 151 (CA); *In re German Date Coffee Company* (1881–82) 20 Ch D 169 (CA); *In re Red Rock Gold Mining Co Ltd* (1889) 61 LT 269 (CA); *In re Palace Restaurants Limited* [1914] 1 Ch 492 (CA); and *Re Baku Consolidated Oilfields Ltd* [1944] 1 All ER 24);
>
> (c) where the principal object of setting up the company can no longer be achieved (*Re Perfectair Holdings Ltd* [1990] BCLC 423);
>
> (d) where the company's only business is ultra vires the company (*In re Crown Bank* (1890) 44 Ch D 634);

(e) where the company is carrying on business at a loss and the remaining assets of the company are insufficient to pay its debts (*In re Wey and Arun Junction Canal Company* (1867) 4 LR Eq 197; *In re Diamond Fuel Company* (1879) 13 Ch D 400 (CA) and *Re Great Northern Copper Mining Co of South Australia Ltd Ex p The Co* (1869) 20 LT 347);

(f) where there is no reasonable hope of ultimate profit for the company (*Davis & Co Ltd v Brunswick (Australia) Ltd; Brunswicke-Balke-Collender Co and Brunswick Radio Corporation* [1936] 1 All ER 299 at p 309 (PC));

(g) where the relationship of the parties in the company has broken down irretrievably (*Re Chynchen Associates Ltd* [1987] 1 HKC 311);

(h) where there is a lack of confidence among the shareholders that threaten the very existence of the company (*Re San Imperial Corp Ltd (No 2)* [1980] 1 HKC 463);

(i) where the winding up of the company would open the door to investigate the misconduct of the directors or promoters of the company (*In re General Phosphate Corporation; In re Northern Transvaal Gold Mining Company; In re Delhi Steamship Company* [1895] 1 Ch 3; *In re Bleriot Manufacturing Aircraft Company (Limited)* (1916) 32 TLR 253; *In re The Newbridge Sanitary Steam System Laundry Ltd* (1917) 1 IR 67 and *In re The Varieties Limited* [1893] 2 Ch 235).

[24] *The list is endless. It is not exhaustive*. (Emphasis added.)

[45] The term 'just and equitable' is thus not construed *ejusdem generis*; instead it should be interpreted as intended, has been and should continue to be, general. How or when it would be just and equitable to wind up a company is necessarily a fact sensitive exercise, its parameters and application largely dependent on perspective and context; the breadth of this statutory jurisdiction is actually illustrated through the many case scenarios or context and should never be read down or narrowly. As opined in *Chow Kwok Chuen*, 'Ultimately, whether equity should intervene must necessarily depend on the justice of the case'.

[46] See helpful discussions on this circumstance in Chapter 29 of *Corporate Powers and Accountability* ((3rd Ed) LexisNexis, 2018) by Loh Siew Cheang.

[47] TEH Holdings and TEH Paper were wound up because the learned judge had found illegality and contraventions of several laws; that it was just and equitable to do so under such conditions. And, this was despite disbelieving the petitioner and his witness and after finding that the petitions were an abuse of court process. Putting aside these matters for a moment, dealing just with the matter of illegality, we would say that given the expanse of the 'just and equitable' ground, it is certainly wide enough to encompass

illegality and contraventions of the law as the basis for winding up a company which is complicit in such illegality. That is not to say that illegality ipso facto results in winding up.

[48] In the first place, this was not the basis of complaints in any of the petitions. The complaints were really footed under s 218(1)(f) with (i) to reemphasis the complaint, that in the particular factual circumstances of s 218(1)(f), it would be just and equitable that TEH Holdings, TEH Paper and PCSB be wound up. All those complaints however, were rejected by the learned judge; the issue of illegality and its factual basis are entirely those of the learned judge.

[49] Although the court acts where there is illegality, it must be where it is *ex facie* and where facts in relation to the illegality or contraventions are uncontroverted. The court will not hesitate to wade in when there is such *ex facie* illegality as it will never lend its aid to 'a man who founds his cause of action on an immoral or an illegal act' (*ex dolo malo non oritur actio*), first propounded by Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341 in a claim brought by a plaintiff seeking to enforce a contractual debt from a defendant to whom he had sold tea. The contract of sale was completed in Dunkirk and the defendant smuggled the tea back to England where such contracts were then prohibited. In rejecting the defendant's argument that the plaintiff was not entitled to enforce the contract, Lord Mansfield explained that the principle evolved not to assist a defendant who is a party to such contract but because of the general principles of policy.

[50] Our courts, without exception, have always set their face against illegality, even if it is not pleaded. This is readily seen in a firm line of authorities including *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281; [1992] 3 CLJ 1667; *Thong Foo Ching & Ors v Shigenori Ono* [1998] 4 MLJ 585; [1998] 4 CLJ 674; subscribing to a view in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; [1989] 1 CLJ Rep 1 where the Privy Council, inter alia, held:

> It is well established as a general principle that the illegality of an agreement sued upon is a matter of which the court is obliged, once it is appraised of facts tending to support the suggestion, to take notice ex proprio motu and even though not pleaded (see eg *Edler v Auerbach*) for clearly, no court could knowingly be party to the enforcement of an unlawful agreement.

[51] However, it must not be forgotten that it is a matter of good policy and proper administration of justice that a clear divide exists between the law of crimes and the law of civil penalties and remedies; the applicable burden and standard of proof are obviously different let alone the right to prefer a charge for

the various offences identified by the court in these appeals. This is an important aspect that appears to have escaped the attention of the learned judge, and which was highlighted recently in *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141. This court noted the view expressed by Lord Toulson in *Patel v Mirza* [2017] 1 All ER 191 (SC), where His Lordship cited Devlin J in *St John Shipping Corporation v Joseph Rank Ltd* [1956] 3 All ER 683 when warning 'of the danger of overkill and whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression':

> [108] The integrity and harmony of the law permit — and I would say require — such flexibility. *Part of the harmony of the law is its division of responsibility between the criminal and civil courts and tribunals. Punishment for wrongdoing is the responsibility for the criminal courts* and, in some instances, statutory regulators. It should also be noted that under the Proceeds of Crime Act 2002 the state has wide powers to confiscate proceeds of crime, whether on a conviction or without a conviction. *Punishment is not generally the function of the civil courts, which are concerned with determining private rights and obligations. The broad principle is not in doubt that the public interest requires that the civil courts should not undermine the effectiveness of the criminal law; but nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing. ParkingEye* is a good example of a case where denial of claim would have been disproportionate. The claimant did not set out to break the law. If it had realised that the letters which it was proposing to send were legally objectionable, the text would have been changed. The illegality did not affect the main performance of the contract. Denial of the claim would have given the defendant a very substantial unjust reward. Respect for the integrity of the justice system is not enhanced if it appears to produce results which are arbitrary, unjust or disproportionate. (Emphasis added.)

[52] We can only re-emphasise this point. The civil courts when determining private disputes including petitions to wind up a company by one of its shareholders ought not to conflate any supposed wrong-doings of its directors with those of the company itself giving rise to potential issues of double jeopardy if the civil courts were to impose penalty or mete out orders addressing the wrong-doings; more so when one examine the terms of s 218 itself. We will return to this aspect shortly.

[53] But, for now, there is also another critical factor which appears to have been overlooked by the learned judge, and that is before striking down agreements, voiding arrangements or winding up corporations, the court must be satisfied that the illegality or the contraventions of law is related to or bear sufficient nexus to the activities or business of the company and/or for which the company was incorporated. Not all breaches of statutory requirements resound in winding up a company even if the breach attracts criminal sanctions; otherwise there will be chaos in commerce and business. This was

cautioned by the Supreme Court in *Beca (Malaysia) Sdn Bhd v Tan Choong Kuang & Anor* [1986] 1 MLJ 390; [1986] CLJ Rep 64, that 'Not every breach of a statutory prohibition would render an agreement illegal or void though such breach may attract criminal penalty'.

[54] The relevant statute complained of must be carefully examined, its purpose or object determined, before the court can conclude one way or another if the contract, act or deed in question is invalidated by such contravention. By way of illustration, take the case of a director who is incompetent to fill such role by reason of insolvency (as in the case of an undischarged bankrupt) or perhaps has a criminal conviction involving bribery, fraud or dishonesty. See s 130A of the old Companies Act 1965 and now s 198 of the Companies Act 2016 (Act 777). It will be noted that any person who contravenes s 198 is under s 198(7) 'commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding one million ringgit'. Is the company where such persons are its directors thereby to be wound up by reason of such contravention? We say not. Even s 198(3) of the Companies Act 2016 provides that such 'disqualified persons' may be appointed or hold office as a director, with leave of the official receiver or the court.

[55] We find support for this view in *Curragh Investments Ltd v Cook* [1974] 3 All ER 658, a case where the purchaser of land was resisting a completion of sale on the ground that the seller company was not registered in Great Britain as required under s 407 of the Companies Act 1948 where Megarry J opined:

> ... I accept of course, that where a contract is made in contravention of some statutory provision then, in addition to any criminal sanctions, the courts may in some cases find the contract itself is stricken with illegality. But for this to occur *there must be sufficient nexus between the statutory requirement and the contract*. If the statute prohibits the making of contracts of the type in question, or provides that one of the parties must satisfy certain requirements (eg by obtaining a licence to registering some particulars) before making any contract of the type in question, then the statutory prohibition or requirement may well be sufficiently linked to the contract for questions to arise of the illegality of any contract made in breach of the statutory requirement. *But it seems to me a far cry from that to the breach of statutory requirements which are not linked sufficiently or at all to the contract in question*. There are today countless statutory requirements of one kind or another, yet I cannot believe that an individual or a company who is in breach of any of these requirements (for example, under the Factories Act) is thereby disabled from making a legal contract for the sale of land or validly entering into covenants for title. To take an example that was mentioned in argument, I do not think that it could seriously be contended that every contract made by an English company, whether for the sale of land or otherwise, is illegal, if when it is made, the company is liable to prosecution and fine for failing to comply with some provision of the Act of 1948, for example, for not filing its annual returns in due time. *Such a doctrine, for which I can see no justification, would result in chaos*. If in the present case I assume

that the vendor is in demonstrable breach of ss 407 and 416, I am still quite unable to see how this provides any ground for contending that the covenants for title that the vendor must give will be impaired by illegality. The breach of the law and the covenants for title seem to me to be wholly unconnected. (Emphasis added.)

[56] This sufficient connection or nexus aspect as enunciated in *Curragh Investments* was also adopted in *Liputan Simfoni* para 115:

[115] In *Patel*, the English Supreme Court had the opportunity to evaluate the state of the common law in respect of illegality in contracts, as found on the maxim of Lord Mansfield in *Holman v Johnson* [1775] 1 Cowp 341 that 'no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act' and the 'reliance principle' as stated in *Bowmakers Ltd v Barnet Instruments Ltd* [1944] 2 All ER 579 and *Tinsley v Milligan*[1993] 3 All ER 65. In that case, the principal issue was whether a party to a contract to carry out an illegal activity was precluded from recovering money paid under the contract from the other party under the law of unjust enrichment. At p 220 of the report, Lord Toulson had this to say:

> [101] That is a valuable insight, with which I agree. I agree also with Professor Burrows' observation that this expression leaves open what is meant by inconsistency (or disharmony) in a particular case, but I do not see this as a weakness. It is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without: (a) *considering the underlying purpose of the prohibition which has been transgressed*; (b) *considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim*; and (c) *keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy.* That trio of necessary considerations can be found in the case law.
>
> ...
>
> [109] The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to *have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed*. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted. (Emphasis added.)

[57] We, too, agree that this trio of considerations — the purpose of the statute; whether any other policy may be undermined or disaffected and the need to exercise some measure of restraint, is necessary and should always be weighed before striking down commercial contracts or as in the case of these

A appeals, winding up of corporations on the ground of illegality even if there are criminal penalties involved in the contraventions. After all, we are in the area of public policy, a term which is not statutorily defined under the Companies Act 1965 or even the Contracts Act 1950. These tests are amply illustrated in *Liputan Simfoni*. Citing *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian*
B *Finance Bhd* [1999] 3 MLJ 81; [1999] 2 CLJ 997; and *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313; [1995] 4 CLJ 300, the Federal Court added that case law 'seems to suggest that the courts should be slow to find illegality and strike down commercial transactions'. See also *Tekun Nasional v Plenitude Drive (M) Sdn Bhd and other*
C *appeals* [2018] 4 MLJ 567, applying *Lori*, *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* and the High Court of Australia's decision in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410.

D

[58] *Liputan Simfoni* concerned competing claims between an innocent landowner and a purchaser of land which was the subject matter of a fraudulent transaction under s 340(2) of the National Land Code. The facts were these.

E **[59]** An imposter company managed to get the land office to issue a replacement title on the pretext of having lost the original. The original was with the plaintiff, the respondent at the Federal Court, at all time. The imposter company sold the land to the second defendant on 23 January 2006 for RM680,000. After it was registered as owner, the second defendant sold the
F land to the appellant ('first defendant'), for RM900,000 on 25 August 2006 with an additional RM870,000 stated as for earthworks. On 25 September 2006, just before completion of the sale, the imposter company entered a private caveat alleging that the second defendant had not settled the full purchase price. On 28 December 2006, the second defendant presented a
G notice to withdraw the caveat together with a memorandum of transfer. On 21 February 2009, the imposter company urged the land office to enter a registrar's caveat on the ground that its caveat was removed without its knowledge. As a result, the appellant ('first defendant') could not be registered
H as the owner.

[60] Meanwhile, the respondent owner of the land upon finding its land being cleared did a land search and learnt of the various transfers and registrations. The respondent made a police report denying any sale and stating
I that the original issue document of title was still in its possession. Proceedings then ensued which led to the removal of the registrar's caveat upon an application by the second defendant. Unfortunately, the respondent was never enjoined as party to nor notified of the removal proceedings. After the application was allowed by the court, the appellant ('first defendant') was

registered on 11 February 2010 as owner, with effect from the date of the original presentation in December 2006.

[61] On 7 September 2012, the respondent entered a private caveat but the land office who was cited as the third defendant removed it upon learning that the respondent's director who attested the relevant documents in support was a bankrupt at the relevant time. In February 2013, the respondent sued seeking for, inter alia, declarations that the transfers of the land are void ab initio and for a restoration of title to the land.

[62] The respondent's claim was allowed by the High Court and confirmed by the Court of Appeal. The High Court found, inter alia, that the appellant's sale and purchase agreement was void ab initio for violating s 24(b) of the Contracts Act 1950 as it had the effect of evading the payment of real property gains tax on the undeclared profit and the payment of stamp duty on the additional consideration for earthworks.

[63] The High Court had relied on *Thong Foo Ching & Ors v Shigenori Ono* and *Palaniappa Chettiar v Arunasalam Chettiar* [1962] 1 MLJ 143; [1962] 1 LNS 115 in holding that an agreement depriving the government of its revenue was illegal and unenforceable as it was contrary to public policy. The Federal Court noted that in *Thong Foo Ching*, the respondent who was a foreigner had been advised by solicitors that the purchase of two pieces of land required the approval of the Foreign Investment Committee, as set down in the government's 'Guidelines for the Regulations of Acquisitions of Assets, Mergers and Takeovers'. This meant incurring additional payment of taxes and stamp duty. To circumvent the guidelines, two separate agreements were executed leading to loss of revenue from real property gains tax and stamp duty for the government.

[64] At first instance, the High Court, inter alia, held that the question of illegality did not arise by the mere execution of the two agreements. The Court of Appeal disagreed, holding that the two agreements 'if allowed to be enforced, would defeat Act 169 and Act 378'; that is, the Real Property Gains Tax Act 1976 and the Stamp Act 1949 respectively. This, in turn, would fall within the ambit of s 24(b) of the Contracts Act 1950. The Court of Appeal cited *Datuk Ong Kee Hui v Sinvium Anak Muit* [1983] 1 MLJ 36 where the Federal Court, inter alia, held that '… the arrangement between the respondent and his party in the matter of his remuneration and resignation is illegal and the illegality is not only with regard to its performance but in its very inception, such arrangement is therefore void ab initio and the parties are outside the pale of the law'.

[65] Similarly, in *Palaniappa Chettiar*, the father had transferred to his son

40 acres of rubber land that he had newly purchased. This was to avoid controls emplaced under the Rubber Regulations (No 17 of 1934) which would have otherwise applied to his total holdings of over 100 acres. When the son subsequently refused to execute a power of attorney in respect of the 40 acres so that the father could sell the land, the father sued seeking a declaration that the son held the 40 acres on trust for him and that the land should be retransferred back to him. The claim was dismissed on the principle of ex turpi causa non oritur actio. This was affirmed by the Privy Council.

[66] The Federal Court recognised that there had been instances where the court had refused to invalidate contracts on the ground of illegality. In *Kin Nam Development Sdn Bhd v Khau Daw Yau* [1984] 1 MLJ 256; [1984] 1 CLJ 347, and *Chang Yun Tai & Ors v HSBC Bank (M) Bhd & Other Appeals* [2011] MLJU 1479; [2011] 7 CLJ 909, to invalidate the relevant contracts; and in *Asia Television Ltd & Anor v Viwa Video Sdn Bhd & Connected Cases* [1984] 2 MLJ 304; [1984] 2 CLJ 80, even on a grant of an Anton Piller order related to a claim for infringement of copyright.

[67] In *Kin Nam Development*, the Federal Court upheld the validity of the sale and purchase agreements for the sale of houses after finding that there was nothing illegal about the consideration or object of such agreements under s 24 of the Contracts Act 1950 although the developer 'may well be guilty of an offence under r 17 for contravening r 11(1) of the Housing Developers (Control and Licensing) Rules 1970'. This was after the Federal Court found that those 'Rules do not affect the validity or otherwise of the contracts which the developer has signed with the purchasers'. This approach was again adopted 30 years later in *Chang Yun Tai* where the issue was whether the financing agreements related to the purchase of the properties were also void for illegality and/or contrary to public policy where the sale and purchase agreements were themselves illegal and/or contrary to public policy. In this regard, this court citing *Kin Nam Development* held that the financing agreements were valid despite such illegality:

> [27] It is to be noted there is no illegal object or consideration under the financing agreement. It strains credulity to suggest that the consideration or object of a loan facility to advance money to the appellants to enable them to purchase the agreements is unlawful. This is unlike providing financing for the purchase of illegal drugs or illegal arms. The object or consideration of the SPA for the sale of the apartments is also not unlawful.

[68] The approach is applied even in respect of interlocutory applications. In *Asia Television*, the High Court had granted an Anton Pillar order to the appellants who claimed copyright in certain films in video cassette form, something popular then in the 80s. Cassettes, documents and various other documents were seized from the respondent's premises under the order. On an

inter partes hearing, the order was set aside when it was shown that the appellants did not have certificates of approval for their publication of such films as required under s 9(2) of the Films (Censorship) Act 1952 in which case, the appellants did not acquire any copyright under the Copyright Act 1969 in the films to begin with. Under s 15(1)(a), it is an offence for which a penalty has been prescribed, to exhibit, sell, hire or distribute any firm if a certificate is not issued under s 9(2) or 9A(2). The Federal Court disagreed, finding that the non-compliance or infringement of the Films (Censorship) Act 1952 did not inhibit the operation of s 6(1)(a) of the Copyright Act 1969 on the acquisition of copyright.

[69] Eusoffe Abdoolcader FJ, speaking for the court said:

> The correlation between the two legislative enactments must in our view depend on whether there is a nexus between them. Mr Davidson agrees in answer to a question we put to him that such nexus is a necessary prerequisite and that the burden is on the respondents to establish this as between the two Acts, In *Curragh Investments Ltd v Cook* [1974] 1 WLR 1559 it was held that for a contract to be illegal as being made in contravention of some statutory provision there has to be a sufficient nexus between the statutory requirement and the contract, and that where statutory requirements were not linked sufficiently, or at all, to the contract no question of its illegality arose.
>
> ...
>
> On a careful examination of the relevant and requisite statutory provisions and a consideration of any interplay between them we can find no sufficient nexus such as would satisfy the test laid down in *Curragh Investments Ltd v Cook*. There is no prohibition in either of the Acts which would preclude the appellants from acquiring copyright if they are otherwise qualified although they may be in breach of the provisions of the Films (Censorship) Act which is concerned only with criminal liability and provides a penalty for breach of its relevant provisions. If it were otherwise so as to result in the defeasance of the appellant's rights under the Copyright Act in this case, then it would be equally logical to deprive a person of his rights under that court if he commits an offence of strict or vicarious liability, such as for instance an offence under the excise laws, without any intention or mens rea.
>
> In the light of the matters we have adumbrated we accordingly find that non-compliance with the provisions of the Films (Censorship) Act does not affect the acquisition of copyright under the Copyright Act. Any infringement of the provisions of the former Act attracts the criminal penalty provided for therein, but if this were also to result in defeating the appellants' rights under the Copyright Act the implications in the matter of economic loss would far exceed the penalty imposable for contravening the censorship requirements of the earlier Act. As we have pointed out there is no express or implied prohibition linking the respective requirements of the two statutes and accordingly no nexus to justify reading them conjunctively and importing the requirements of one as a condition precedent to the operation of the other.

[70] Going back to *Liputan Simfoni*, the two legislations involved were the

Stamp Act 1949 and the Real Property Gains Tax Act 1976; and the Federal Court examined their respective purpose, whether such object had been compromised by or in the appellant's SPA before concluding in the negative:

> [125] Having carefully considered the authorities cited by the parties, we are inclined to agree with the contention of learned counsel for the first defendant that the second SPA is not void. We agree with the view that the courts should be slow in striking down commercial contracts on the ground of illegality. The compliance with the Stamp Act 1949 and the Real Property Gains Tax 1976 are not the prerequisite for the second SPA to be enforceable. There is no prohibition under the two Acts to preclude the first defendant from acquiring rights to the subject land. The Stamp Act 1949 provides a penalty for breach of its provisions. Similarly, under the Real Property Gains Tax Act 1976 there are penalties for breach of its provision. In addition, it is provided that tax due and payable may be recovered by the Government by civil proceeding as a debt to the Government. The object of the two Acts is to raise revenue. There is therefore no sufficient nexus such as would satisfy the test laid down in *Curragh Investment Ltd*. The first defendant's infringement of the two Acts therefore did not prevent it from suing on the contract which is legal.

[71] This approach of examining the object or purpose of the relevant legislation before invalidating an agreement or arrangement is not new. As seen from *Liputan Simfoni*; it was already applied in *Kin Nam* and even earlier in *Beca (M) Sdn Bhd*. *Beca* is yet another authority of how the intent of legislation needs to be carefully examined before ruling on the issue of illegality. This was a case on the enforceability of a provisional agreement to purchase three units of flats where the unlicensed developer collected deposits or booking fees in excess of what was allowed under the then Housing (Control and Licensing of Developers) Rules 1980 ('HDR 1980') made under the Housing (Control and Licensing of Developers) Enactment 1978 ('the Enactment'). The Sessions Court at Kota Kinabalu found the provisional agreement to be valid. Although the developer's appeal was dismissed on another ground, the High Court had held the provisional agreement to be illegal. It is in this respect that we find the deliberations of the Supreme Court relevant to these appeals.

[72] Agreeing with the sessions court, the Supreme Court held, inter alia, that in considering the effect of breaches of the HDR 1980 on the provisional agreement, it was necessary to consider the object of the agreement, whether the Enactment and/or the HDR 1980 prohibited the making of such agreements; that the court should be slow to imply and infer any statutory prohibition and should only do so where the implication is clear:

> ... Whether an agreement is implicitly forbidden depends upon the construction of the statute, and for this purpose no one test is decisive. Persons who deliberately set out to break the law cannot be expect to be aided in a court of justice. It would be a different matter when the law is unwittingly broken. An agreement for the sale of say, frozen food, is not to be considered to be illegal or void merely because the

premises in which the frozen food is sold does not comply with the law. We recognise that each case must be decided by reference to the relevant statute.

[73] After examining the case authorities and the intent of the statute, the Supreme Court concluded that consensus of authorities suggested that the contravention of any of the rules only rendered the developers liable to a penalty but did not invalidate any agreement entered into by the developers and the buyers; that there was no distinction between provisional agreements and other agreements, that such agreements were valid and binding but voidable at the behest of the buyers:

> The appellants as developers should know that they could not carry on the business of housing development unless they had obtained a licence. Yet, they acted as if they had the necessary licence by collecting deposit from and entering into the provisional agreement with buyers who had no reason to doubt the bona fide of the developers. The buyers could not be expected to know that the developers had no licence at the time. It would be expecting too much of the buyers to say that they 'had the means of discovering the truth with ordinary diligence' to quote the words of s 19 of the Contracts Act 1950 ...
>
> Having regard to the scope and purpose of the Enactment and the Rules made thereunder, they are clearly made for the benefit of a class of people, namely, the house buyers. The duty of observing the law is firmly placed on the housing developers for the protection of the house buyers. Hence, any infringement of the law would render the housing developers liable to penalty on conviction. Although the developers have to comply with a number of statutory requirements we are unable to find anything in the Enactment or the Rules which would invalidate an agreement or contract as a result of any breach of the Enactment or the Rules. On the facts of this case we are of the view that the transaction is valid until it is avoided. The buyers had elected to avoid the agreement and claimed for the return of the deposit.
>
> ... So the avoidance of the agreement would cause inconvenience and injury to innocent members of the public. To declare the agreement binding but voidable at the instance of the buyers would provide no incentive to the developers to do any act before obtaining a proper licence.

[74] It is interesting to note that in *Beca*, the Supreme Court had cited *Daiman Development Sdn Bhd v Mathew Lui Chin Teck & Anor & Another Appeal* [1981] 1 MLJ 56 where the Privy Council similarly examined the then Housing Developers (Control and Licensing) Rules 1970, made under the Housing Developers (Control and Licensing) Act 1966, to see if the Act or the Rules contained any provisions invalidating contracts which did not comply with the Rules.

[75] In *Daiman Development*, the respondent purchaser had moved the court for an order of specific performance to compel the appellant developer to complete the sale to him of a semi-D house at the price appearing in the

'booking pro-forma'. The sale was made before the relevant building plans had been approved, a fact which the respondent purchaser was aware of at the time of signing the booking pro-forma and payment of a booking fee. The appellant developer increased the purchase price after the approval was obtained and when the purchaser refused to pay the increased price, the appellant informed the purchaser that it would cancel the booking and return the booking fee. The purchaser went to court to compel the developer to complete the sale under the booking pro-forma. The appellant's main defence was an absence of contract as the formal contract had yet to be signed.

[76] The High Court, Federal Court and the Privy Council spoke almost with one voice in allowing the purchaser's claim and ordering specific performance, recognising the 'booking pro-forma was a firm contract'.

[77] The Privy Council, however took the point on the application of the HDA and HDR further after noting that the Federal Court had concluded that the appellant 'was bound by the rules and 'only details may be inserted into the further agreement'; that the provisions in the pro forma allowed variation in two specified respects: price and size of subject land. After examining the HDA and the HDR, Sir Garfield Barwick, delivering the judgment of the Board said as follows:

> Rule 17 provides that contravention by a licensed housing developer of any of the rules shall be an offence and render the developer liable on conviction to a fine or, for a second or subsequent offence, a fine or imprisonment or both. Nothing in the rules expressly purports to invalidate a contract which does not comply with the provisions of the rules.
>
> The rules impose no penalties on a purchaser who enters into a contract which does not conform to the requirements of the rules. Clearly, r 12 does not exclude the possibility of the contract of sale containing terms and conditions other than such as are designed to effectuate the requirements of the rules. Rule 12 requires a contract to contain within its terms the stipulated provisions. It is observable that r 12 does cover much of the relationship of vendor and purchase in relation to the purchaser and is mandatory so far as the appellant is concerned.

[78] It is thus, quite evident that the same consistent approach has been adopted and applied when dealing with alleged contraventions of law as a basis of nullifying agreements, that the particular legislation must always be carefully examined before any final pronouncement may be properly made.

[79] Thus far we have examined the position of the effect, implication and impact of contraventions in the context of agreements entered into between contracting parties where one party has approached the court for redress. Is the position any different when that complaint becomes the ground for liquidating a corporate sole which is solvent and for which the other grounds in s 218 of the

Companies Act 1965 have been expressly rejected? More particularly, in the context of the present appeals, where the winding up of the solvent company is ordered by the court in the purported exercise of its discretion under the 'just and equitable' ground in s 218(1)(i) of the Companies Act 1965 due to the presence of illegality or contraventions of law.

[80] Aside from citing the basic principle that the court should act when confronted with illegality, the learned judge had relied on the High Court decision of *Hj Afifi bin Hj Hassan v Norman Disney & Young Sdn Bhd & Ors* [2014] 7 MLJ 738 as warranting that exercise of discretion, that a company may be wound up on the just and equitable ground where there is illegality — see paras 235 to 237. That decision was affirmed on appeal and leave to appeal to the Federal Court was allowed on the question of whether a litigant who is in *pari delicto* to the illegal act complained of may be treated as an exception on the general principle in *Holman v Johnson* (1775) 1 Cowp 341. It is the decision on the winding up on the just and equitable ground due to illegality that is of focus here.

[81] With respect, this decision is not authority for the proposition that the court may wind up a company on the ground of illegality or contraventions of law without more. On the contrary, had the case been examined carefully, it would become readily apparent that the Court of Appeal was in fact applying principles as discussed above — see *Foo Jong Wee & Ors v Haji Afifi bin Haji Hassan* [2016] MLJU 1673; [2016] 6 CLJ 696.

[82] The learned judicial commissioner in that case had wound up the company, *Norman Disney & Young Sdn Bhd* after being satisfied that 'the carrying on of business by the company is illegal and in breach of the statutory requirements of the Registration of Engineers Act 1967'; the only issue was whether the petitioner, who was party to the illegality should be 'assisted' by the court. The facts there show that the company, an engineering consultant firm based in Australia, through a restructuring exercise, an 'elaborate scheme' involving the execution of no less than nine agreements, all with the object of allowing the Australian company, to retain voting control over the company set up on our shores, through the use of power of attorney. As explained by the Court of Appeal:

> By that arrangement, on the face of the register the company became a Bumiputera majority company and the company appeared to comply with the REA 1967 since all shareholders were Malaysian professional engineers.

[83] The reality was otherwise. Amongst the grounds moved for winding up the company was the allegation that there was 'deception and misrepresentation by the directors of the company to the authorities, clients and public by presenting the company as owned and controlled by a

Bumiputera'. The Court of Appeal affirmed the decision of the High Court, agreeing with the respondent that 'a contract which is designed to circumvent a statute and to deceive a public authority is illegal in nature' (para 14); that 'conducting business in this country through 'Ali Baba' type of companies is without doubt illegal as being contrary to public policy' (para 15); that a winding up will be ordered 'where a company was formed to carry out fraud, or to carry on an illegal business'; that is, fraud in inception or what was referred to as a 'bubble company' (para 28).

[84] We have no reason to disagree with that approach and that a company may, where it is set up with a view to 'rob the public of so much money and put it into (their) own pockets' be wound up within the just and equitable ground in s 218(1)(i) of the Companies Act 1965. As opined by Sir W Page Wood VC in *In re London and County Coal Company* (1866) LR 3 Eq 355:

> [the company] is a mere contrivance, under the guise of an agreement for the advantage of the company, to plunder the public to this extent. In that state of things, it is expedient alike for the public, the petitioner, and these gentlemen themselves, who have paid not the least regard to justice and propriety, that the company should be at once abolished.

[85] We would add that in the matter of liquidation of a corporate sole, winding up orders should only be granted where the cessation of illegality complained of can only be achieved through or by the dissolution of the company itself, that there is no other avenue or recourse available but to wind up the company in order to stop the illegality. This is also apparent from *In re London and County Coal Company* where Wood VC had remarked that 'the parties might find a more beneficial mode of extinguishing it than through the medium of a winding up order'; however His Lordship agreed to 'extinguish' the 'wretched concern' and went on to pronounce that 'a winding up order I shall make'. See also *Re Brinsmead (Thomas Edward) & Sons* [1897] 1 Ch 45, 406, a company which was initiated to perpetuate a fraud by passing off its products as those of John Brinsmead & Sons who were renowned piano makers.

[86] On the facts in these appeals, none of the companies were formed with illicit purpose or intent of circumventing any law, be it the Companies Act 1965, Income Tax Act 1967 or the Penal Code. Furthermore, it was not the suggestion of the petitioner or the families that he fronted, and it would be highly improper to attempt to change his stance midstream to claim otherwise just because the learned judge had found the alleged contraventions to be matters of concern that His Lordship could not ignore. The object and activities of the TEH Paper and TEH Holdings and even PCSB are not in question or under scrutiny; and this is materially different from the position in *Foo Jong Wee & Ors v Haji Afifi bin Haji Hassan*, *In re London and County Coal*

Company and *Re Brinsmead (Thomas Edward) & Sons*. This important point appears to have escaped the attention of the learned judge and the Court of Appeal which affirmed the decision on appeal. Where companies are fraudulently established and are themselves engines of fraud, their continued existence must be immediately apprehended. Winding up, though draconian, is necessary in order to put an end to that unlawfulness. And, it is in that sense that the court will not hesitate to act.

[87] In the context of these appeals, three statutes were identified by the learned judge, namely Companies Act 1965, Income Tax Act 1967 and the Penal Code to have been violated. Each of these must be examined against their specific intent and in the context of s 218(1)(i); and against s 218(1) itself. While the learned judge cited the relevant provisions, His Lordship did not ask himself the necessary question of intent and sufficiency of nexus or what we had earlier referred to as the trio considerations.

[88] The learned judge had identified contraventions of ss 136, 169, 171 and 364 of the Companies Act 1965; and ss 193, 199 and 200 of the Penal Code and s 114 of the Income Tax Act 1967. The provisions of the Penal Code and the Income Tax Act are actually related to the contraventions of the Companies Act 1965. Section 169 read with s 171(1) of the Companies Act 1965 concerns the duty of the directors to produce financial reports which are accurate and give a true and fair view of the state of affairs of the company; s 364(2) deals with where the directors made false statements on the companies' accounts; and s 136 is where the directors used company funds to pay their income tax.

[89] In relation to these contraventions, the court should take into account the provisions of s 218(1) and the other provisions of the Companies Act 1965; as well as the intent of the Companies Act 1965. In the context of winding up, s 218 has already prescribed the particular contraventions under the Companies Act 1965 upon which a company may be wound up. These grounds should not be expanded. Where the ground is an allegation of contravention(s) of the Companies Act 1965 itself, there are already s 218(1)(b), (c) and (d). These are express provisions on the specific type or nature of contraventions of the Companies Act 1965 that would merit a winding up. Had it been the intention that any or all contraventions of the Companies Act 1965 would warrant a winding up, there would have been some express provision to that effect. Instead, selected contraventions were identified and there are good reasons for such provisions. Section 218(1)(b), (c) and (d) are where the statutory reports are not at all lodged or the statutory meetings even held; where the company does not even commence business within a year after its incorporation or has suspended its business for a whole year; or where its members has fallen below two in number.

[90] These are prescribed situations where it would be just and equitable to wind up such companies and the court should always be slow to import into the just and equitable ground the right to wind up a company for contraventions of other provisions of the Companies Act 1965 unless such contraventions can be co-related with any of the other grounds in s 218(1). On the part of the petitioner, it is too late and we agree with learned counsel for TEH Holdings and TEH Paper that since he had pursued his complaints under limbs (f) and (i), he cannot now re-characterise his petitions.

[91] Accepting for a moment that there are violations by TSK of the Companies Act 1965 as identified by the learned judge, the contraventions are by TSK personally, whether as director or as an individual, and are not those of or by TEH Paper and/or TEH Holdings. Again, these companies were properly set up and they carry on legitimate businesses. The wrongs of the directors cannot, unless they fall within some ground in s 218(1), be ascribed to the companies themselves to thence form the basis for the companies themselves to be wound up. That would amount to 'an overkill'; almost deploying a 'sledgehammer remedy' to deal with matters outside the intent of s 218(1) — see *Tahansan Sdn Bhd v Tay Bok Choon* [1985] 1 MLJ 58.

[92] The just and equitable jurisdiction must be exercised carefully and judiciously, with special regard for the irreversible and drastic nature of a winding up as a court-ordered remedy (see *Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd and other appeals* [2018] 1 SLR 763). Not only are there more moderate remedies available, the purported wrongs under the Income Tax Act 1967 have been addressed and dealt with by the relevant authorities; and where they have not, to be dealt with by those charged with the necessary jurisdiction; or as far as the petitioner is concerned, for him, as a minority shareholder in both TEH Holdings and TEH Paper, to file an action under s 181 of the Companies Act 1965 since the learned judge found that his real complaint was of oppression and that he actually wanted his shares bought out.

[93] Factually, there are also grave concerns on the existence of the illegalities. As gathered from the above portions of the grounds of judgment, the contravention and/or illegality pertain to the 'family fund and under counter-activities'; how monies from the family companies are 'siphoned off' for these purposes and, for some of the directors to pay and/or evade tax. However, when the allegations are examined, it readily becomes apparent that there is much uncertainty, vagueness and a paucity of evidence vital to establish the very existence of the particular contravention, wrong or illegality.

[94] Take first the 'family fund and/or under counter activities', described sometimes as 'family account' or 'reserve fund' and putting aside the matter of

admissions for a moment, it is actually unclear what the 'family fund' is. This is apparent from the judgment where His Lordship himself described the 'dealings vis a vis the family fund and under counter activities' as 'obscure and murky'; that 'there was a marked secrecy about the details'; and even referring to it as 'the elusive fund'. So much so that 'right until the end of the trial, hardly anything was revealed' about both the fund and/or under counter activities; whether as to its 'size … and frequency of payout etc' (see paras 202 and 206). The fund appears to comprise monies from proceeds of the sale of waste paper which should have properly gone into the companies' books but were instead, diverted into the fund and used by family members for anything from weddings to funerals, education and just about any other activity or occasion of such nature.

[95] The learned judge further stated 'emphatically that the family fund/under counter activities do not appear to be a new phenomenon and are likely than not they were in existence during the tenure of the late TSJ who was the deemed managing director of the Tan Eng Hong group of companies. He was the autocratic leader of the group and was involved in the running of the family fund and the under counter activities'. TSJ was the late father of TCL.

[96] As far as the oral testimonies of the petitioner and his witnesses on these matters are concerned, the learned judge disbelieved them. This is amply explained in the judgment and we do not propose to repeat them; nor disturb those findings; more so when the same had been affirmed on appeal. These findings of fact were reached after the learned judge had carefully and painstakingly evaluated their evidence for credibility, consistency, veracity and reliability; and on all fronts, their evidence was extremely wanting.

[97] That then leaves the details of the fund and the commission of the contraventions/illegality to documentary evidence. The documentary evidence comprised the police reports made by the petitioner and TCL, and the affidavits affirmed by TSK and the SMS sent by TSK to TCL.

[98] The police report made by the petitioner on 28 July 2009 is of little assistance (pp 8–10 CBD):

> 3. We are in possession of some documentary evidence which show that the money belonging to one or more of the above 3 companies may have been dishonestly siphoned off to certain accounts of individual directors of the companies and/or diverted to the said directors' personal accounts thereby depriving the companies and its shareholders the money which is rightfully theirs.
>
> 4. The directors who may have acted dishonestly in siphoning off and/or diverting the money belonging to the company are as follows:
>
> (a) Tan Seng Choo;

(b) Tan Seng Kiat;

(c) Tan Seng Kow;

(d) Tan Kin Seng.

Tan Choo Keng, one of the directors of Tan Eng Hong Paper & Stationery Sdn Bhd can assist the police in their investigation.

5. As a result of the siphoning off and/or diversion of the companies' money, based on the available documentary evidence, the companies have lost an estimated sum of about RM1.5 million each year.

6. Tan Seng Kow, the Group Managing Director has sent an SMS to Tan Choo Leng, a director of one of the above 3 companies and a shareholder of Tan Eng Hong Holdings Sdn Bhd, wherein he (Tan Seng Kow) had admitted that he has siphoned off the money belonging to one of the subsidiaries of Tan Eng Hong Holdings Sdn Bhd called Perusahaan Konkrit Melaka Sdn Bhd.

7. I request the police authorities to investigate into this matter thoroughly and if there is evidence of any criminal breach of trust or other criminal wrongdoing on the part of the persons named above, to prosecute them.

8. We are prepared to produce and supply the documents in our possession which show such dishonest acts or wrongdoing as stated above. Tan Choo Leong, who is an accountant, is prepared to assist the police in this matter.

[99] A substantially similar report made by TCL over a year later, on 21 August 2010 (pp 22–24 CBD) is equally unhelpful. In that report, TCL complained of TSK 'instructed his staff on 16 July 2009 to destroy the accounting records of the company. As a result, I have lodged a police report … Tan Seng Kow has admitted in his fourth affidavit of the respondents affirmed by him on 11 August 2009 that he had destroyed the files'.

[100] TCL denied knowledge of the 'family fund' or 'family account' set up and ran by his late father, and further alleged in the police report that the:

… so-called family account is a mere eye-wash as in the recent EGM of the company held on 29.7.2010, I, as a family member, director and shareholder of the company requested the directors to produce the so-called family account for inspection. However, they refused to accede to my reasonable request. As a result it is now confirmed that they have siphoned off funds for their own benefit and it has been declared as an illegal aid at the said EGM. Tan Seng Kow's claim (as stated above) that he was entitled to profit sharing in Perusahaan Konkrit Melaka Sdn Bhd is a mere excuse to siphon off funds as he himself has confirmed in the recently held EGM of the company that there was no resolution or sanction of the shareholders/directors to approve such profit sharing.

I have no knowledge of the illegal and wrongful acts done by the directors named above. I did not consent to the same nor participated in the same. I also did not expressly or impliedly authorise the, to do so.

> I am of the opinion that what had been done by the 4 directors amounts to criminal breach of trust. I request the police authorities to conduct a thorough investigation into this report and to take such action as provided under the law against anyone who has/have committed any criminal act complained of. I am prepared to supply to the police authorities all the relevant documents in my possession in relation to this report.

[101] We find these reports bearing the same weight as their oral articulations; that is, none, especially since the credibility of the makers of these reports have been severely undermined.

[102] As for the documentary evidence, these too, are not free of problems. The documents said to support the court's findings of contravention are TSK's affidavit and SMS (phone message — paras 201–203).

[103] The phone message is set out at para 201 and having looked at it, we cannot see how it yields an admission 'of his folly':

> I admit I make mistakes along my way because I felt I deserve more for my entireness effort in pursuing excellence in my work. I did try to cover my large amount of pcb and supposedly entitled profit sharing by taking some steel purchases. I should have done it openly but choose different way. This is the mistake I have to regret for my life. Sorry.
>
> Please work out a nicer exit plan to allow me to complete the recovery plan for TEH. After all, TEH is too much of my life and let me see it running at full force, my parting wish. After that, we can work out an amicable solution to allow me to do what I know best. Please keep this message confidential. I feel relieve after this confession. Sorry again.

[104] The admission in the phone message of TSK is an admission of 'making mistakes along the way', that he had evaded tax in the way he had taken his share of profits. And, it is only an admission because TSK uses the word 'admit' himself. That is, however, far from amounting to an admission or confession of contravention of any of the law or the laws identified by the High Court; neither can any inference be drawn to that effect — see s 17 of the Evidence Act 1950 which deals with admissions and confessions; the distinction between the two is important in law and in their effect. See also *Evidence — Practice and Procedure* (3rd Ed) by Augustine Paul, pp 160, 317; *Law of Evidence — A Commentary* (Sweet & Maxwell 2020) by Srimurugan Alagan; pp 96–99; 133–134. Furthermore, admissions under s 31 of the Evidence Act 1950, 'are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained'. As explained in *MA Clyde v Wong Ah Mei & Anor* [1970] 2 MLJ 183, and also *Randhir Singh a/l Bhajnik Singh v Sunildave Singh Parmar (the administrator of the estate of K Surjit Kaur a/p Gean Kartar Singh, deceased)* [2018] 12 MLJ 166; [2018] 7 AMR 237; an

admission 'cannot be regarded as conclusive, and it is open to the person who made it to explain it away ...'. If it was not explained, then it may amount to evidence against the person by whom it was made.

[105] TSK had explained the perceived admission and the circumstances of his actions; and as pointed out by learned counsel for the companies, those explanations were not given proper and due consideration. In this respect, we have also had a look at TSK's affidavits and we agree with his counsel that TSK's explanations have not been taken into consideration. TSK had refuted the allegations and had explained that the use of the family fund had ceased upon service of the winding up petitions; that much of the fund which had existed and was operated by TSJ during his tenure as the deemed managing director (mid-1990s, a fact which was acknowledged by the learned judge) had since ceased in which case, the complaints were stale and/or undermined by laches, waiver and acquiescence. In fact, the shareholders of TEH Paper and TEH Holdings had resolved at an EGM on 29 July 2010 to cease these practices but the petitioner and TCL's family had voted against it — see RCB pp 220–227.

[106] TSK had further explained that the 'fund had nothing to do with the companies and that any wrongful usage (which is denied) do not give rise to grievances against the company or any of the group companies but only against the individuals concerned — in their capacity as the directors of the company. By the same token, the petitioner's grievances in relation to the wrongful or unfair usage of the family fund were the grievances of an unhappy family member and not of a shareholder or contributory of any company'. TSK also explained that the 'operation of the family fund had no relation to the running of the company. The channelling of the funds from the company was a tax evasion issue which the company had to face and be penalised'; and the company had been penalised. Further, when TSK said that the fund belonged to the family and not to the companies, he meant that it was entrusted to certain family members to manage the fund. In our view, these are material and relevant considerations which must weigh with the learned judge in determining the matter of contraventions and illegality.

[107] In any event, His Lordship himself was not convinced on the allegations of TSK helping himself to the monies of the companies. At para 213, His Lordship held that he was 'not entirely convinced that TSK had illegally taken a 10% profit sharing as TCL's minutes of the meeting of the second generation on 4 July 2009 suggests that TSK was entitled to 10% profit sharing'. Consequently, it was erroneous for the learned judge to then proceed to rely on the so-called admissions of TSK to found the existence of contraventions and illegality which formed the premise for the justifiable and equitable winding up of TEH Holdings and TEH Paper.

[108] At best, as was observed by the learned judge, 'this phone message taken together with TSK's admissions during cross-examination, speaks volumes about the egregious way in which TEH Paper and TEH Holdings (and its subsidiaries) were run'. But, TEH Holdings and TEH Paper were not wound up because of how they were run. These companies were wound up because of the court's conclusions of illegality committed by their directors, in particular TSK; a situation which factually is tenuous and more so when the legal principles are applied.

[109] A final word before we leave this first question. The learned judge had also found it just and equitable to wind up TEH Holdings and TEH Paper so that 'a full and independent investigation can be carried out in respect of the accounts of these two companies'. His Lordship had cited *Company Law Powers and Accountability* by Loh Siew Cheang and William MF Wong; Kerby Lau in support. The writers had relied on the English Companies Court decision of *Bell Group Finance (Pty) Ltd (in liq) v Bell Group (UK) Holdings Ltd* [1996] 1 BCLC 304 for their proposition that: 'Where the affairs of the company have been managed in a confusing way giving rise to grave suspicion or doubt as to the bona fide of transactions, a winding up order may be made on the just and equitable ground to enable a full and independent investigation to be carried out'.

[110] Having sighted *Bell Group*, we find that the case is distinguishable in that the petitioner there had specifically sought for the winding up of Bell Group (UK) Holdings Ltd on the ground that the company was unable to pay its debts and that it was just and equitable that it should be wound up. Illegality was not alleged. The respondent opposed the petition on the ground, inter alia, that it had no assets. Chadwick J was in no doubt that the company could still be wound up even though it had no assets and 'where the only purpose of the order would be to enable an investigation to take place into the company's affairs'; given that 'the book value of some £353m are estimated to have nil realisable value'. His Lordship found that s 125(1) of the Insolvency Act 1986 'enjoins the court not to refuse a winding up order on the ground only that the company has no assets. Lack of assets cannot by itself be a ground for refusing an order if there is some other reason to make one'.

[111] Loh Siew Cheang in *Corporate Powers and Accountability* (3rd Ed, Lexis Nexis, 2018) referred to earlier, has since cited the *Bell Group* decision in addition to the case of *Re Investment Properties International Ltd* 41 DLR (3d) 217; an authority for the exercise of discretion to wind up on the just and equitable principle where the organisation of the company is through a series of confusing and highly suspicious transactions such that voting control was compromised. Those are not the factual allegations in these petitions; neither are they the reasons for the winding up orders.

[112] The decision in *Bell Group*, as was that in *Re Crigglestone Coal Co Ltd* [1906] 2 Ch 327 were cases where winding up orders were made so as to provide the machinery for ascertaining whether the company had any assets; and this was seen as being advantageous to the unsecured creditors or to provide a reasonable probability or even a reasonable possibility of advantage to the unsecured creditors. This seems to be the recent approach of the English Courts — that the courts need to be satisfied that there is a reasonable possibility of a benefit resulting from the winding up order before granting the same — see *JSC Bank of Moscow v Kekhman and others* [2014] BPIR 959; [2015] 1 WLR 3737, paras 63 and 110; and *Re Glenn Maud Edgeworth Capital (Luxembourg) SARL and another v Maud* [2020] EWHC 974 (Ch) at paras 114 to 117.

[113] Both TEH Paper and TEH Holdings have assets and the investigations contemplated by the learned judge was to examine the accounts. With the huge factual and legal concerns already discussed, we do not find the orders proper. Particularly too when the petitioner's real objective was not consistent with the grounds relied on, and as expressed in *Charles Forte Investments Ltd v Amanda* [1963] 2 All ER 940, the winding up order was really not the proper remedy in the circumstances of the case. The winding up order would cause irreparable damage to the interests of other innocent shareholders, creditors and the like; when the petitioner could seek his appropriate remedy under the regime accorded to minority shareholders. There are more moderate remedies available, some have already been meted out such as those taken by the Department of Inland Revenue.

[114] With all these compelling reasons, it cannot be said that equity and justice should intervene to order the winding up of TEH Holdings and TEH Paper. We, thus, find that the first question must be answered in the negative:

> Whether a petitioner shall be allowed with equitable relief under section 218(1)(i) of the Companies Act 1965 when the petitioner's truthfulness and credibility have been impugned by the Winding Up Court.

[115] The credibility of the petitioner was severely undermined and quartered by the learned judge who found him not to be a witness of truth, that he was a tool for TCL and the fourth family, and that the petitions were filed for a collateral purpose and an abuse of process. His witnesses did not fare any better, especially TCL. This is readily apparent throughout the judgment of the High Court which findings of fact and result were unanimously affirmed by the Court of Appeal. There are suggestions from counsel for the petitioner that the learned judge was not entitled to reach such findings as His Lordship did not hear or see 'the man who was the target of criticism. His reliance on the note made by his predecessor is *nihil ad rem* because the impression made by a

witness on one trier may not be the same as that made upon the mind of another trier of fact'. A

[116] In the first place, we, as the third trier of the law, cannot and will not disturb findings of fact. More so, where those findings of fact have been affirmed on appeal. In any event, we do not find the concerns of the petitioner founded having examined the records of appeal and having gone through the whole grounds, very carefully. The deliberations and reasoning of the learned judge must be appreciated and understood holistically; and when that is properly done, there is no basis for the petitioner's complaints. Judges are quite frequently called upon to carry on conduct of trials, from or at any stage of the trial. The judge is vested with discretion on how to deal with evidence recorded to date; including recalling of witnesses, whether for the whole or any portion of evidence given — see s 18 of the Courts of Judicature Act 1964 which reads as follows: B C D

> 18 (1) Every proceeding in the High Court and all business arising thereout shall, save as provided by any written law, be heard and disposed of before a single Judge.
>
> (2) Whenever any Judge, after having heard and recorded the whole or any part of the evidence in a proceeding, is unable through death, illness or other cause to conclude the proceeding, another Judge may:
>
> (a) continue with the proceeding from the stage at which the previous Judge left it and:
>
> (i) act on the evidence already recorded by the previous Judge; or
>
> (ii) act on the evidence partly recorded by the previous Judge and partly by himself; or
>
> (b) resummon the witnesses and recommence the proceeding.
>
> (3) Where the Judge acts under subparagraph 2(a)(i) he may, either on his volition or at the request of any party to the proceeding, recall any of the witnesses as in respect of any part of the evidence already recorded, or he may take their evidence afresh:
>
> Provided that in respect of a criminal proceeding, the Court of Appeal and the Federal Court may, on appeal, set aside any conviction had on evidence not wholly recorded by the Judge before whom the conviction was had if such Court is of the opinion that the accused had been materially prejudiced thereby, and may order a new trial.

E F G H

[117] There is no record of any invocation of s 18, a protest or reservation, or even a request or suggestion to the learned judge that His Lordship should rehear all or any part of evidence already given. Instead, the learned judge who took over after the earlier judges had heard and recorded 22 days of evidence over a span of two years went on to complete the trial after a total of 41 days, without incident. I

[118] With such strong and clear findings of credibility or lack of it, the presence of abuse of process plus a rejection of evidence necessary to establish the grounds relied on, and there being no other evidence available for the court to form its opinion under s 218(1)(i) based on the petitioner's complaints, the proper course for the learned judge was to dismiss the petitions. We can make no clearer conclusion than that as public policy and the interests of justice will not be served for any equitable relief to still be granted. On the contrary, these same considerations will require the court to dismiss the petitions.

[119] This is not to be confused with the situation where illegality or contraventions of the law formed the basis of the petitioner's petitions under s 218(1)(i), because it was not. Had that been the case, allegations that the petitioner is either complicit or privy to such contravention or illegality have not and will not deter the court, in appropriate cases, from granting the order to wind up because it is just and equitable to do so. The case law and principles discussed earlier, have explained that the involvement of a plaintiff, applicant or petitioner, is no impediment to the power of the court to grant the appropriate relief even in such circumstances.

[120] However, on the facts and circumstances in these appeals, and for the reasons already discussed in relation to the High Court's conclusions on the presence of illegality and the application of the correct principles, with the compelling lack of evidence, we find that the petitions ought to have been dismissed. We therefore answer this second question posed by the wound up companies, also in the negative.

QUESTIONS POSED BY THE PETITIONER

[121] Given our answers to the two questions posed by TEH Holdings and TEH Paper, we do not find it appropriate or necessary to answer the two questions posed by the petitioner. We therefore decline to answer the same.

CONCLUSIONS

[122] The two questions posed by TEH Holdings and TEH Paper are answered in the negative with the result that we are of the firm view that the learned judge and the Court of Appeal have fallen into plain error. We, therefore unanimously allow the appeals by TEH Holdings and TEH Paper and the decisions of the High Court ordering the winding up of these companies are hereby set aside. We further unanimously dismiss the appeals by the petitioner.

Order accordingly.

Reported by Ashok Kumar